

Quarterly Report
of the
ATTORNEY GENERAL
of
ALABAMA



For The Period
From January 1, 1954
Through March 31, 1954
VOLUME 74

SI GARRETT, Attorney General

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QUARTERLY REPORT
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ALABAMA

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Volume No. 74

**TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS
OF ALABAMA:**

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from January 1, 1954, through March 31, 1954, is published in compliance with the provisions of Title 55, Section 228, Code of Alabama, 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

SI GARRETT,

Attorney General.

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OPINIONS

January 6, 1954

Hon. J. C. Coleman
Clerk, Circuit Court
Greene County
Eutaw, Alabama

Firearms—Uniform Firearms Act—Costs and Fees—
Solicitors.

In conviction for a misdemeanor under the provisions of the Uniform Firearms Act, Title 14, Sections 172-186, Code of Alabama 1940, as last amended by Act No. 784, General and Local Acts 1951, page 1378, the clerk should tax as cost a solicitor's fee of ten dollars "for each conviction of a misdemeanor, not otherwise provided for," and not a solicitor's fee of thirty dollars for convictions under Title 14, Sections 161, 164 and 165, Code of Alabama 1940, as provided for in Title 11, Section 85, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of October 9, 1953, as as follows:

"In a recent case in the Circuit Court of Greene County a defendant plead guilty to and was convicted of violating the Uniform Firearms Act (Sections 172, et seq. of Title 14, pocket parts). There is no specific provision as to the amount of the Solicitor's fee for a conviction of this sort in section 85 of Title 11, though there are provisions in this section for the Solicitor's fee in cases of convictions under Sections 161, 164 and 165 of Title 14. The attorney for this defendant contends that these provisions do not cover convictions under the Uniform Firearms Act, and therefore the amount of the Solicitor's fee is \$10.00 as a misdemeanor not otherwise provided for.

"Is the amount of the Solicitor's fee for a conviction of a violation of the Uniform Firearms Act \$30.00 the same as a conviction of a violation of Sections 161, 164 and 165 of Title 14, or is it \$10.00 as a misdemeanor not otherwise provided for, under the provisions of Section 85 of Title 11?"

In my opinion the proper solicitor's fee to be charged in the case described in your inquiry is the amount of ten dollars "for each conviction of a misdemeanor, not otherwise provided for." Title 11, Section 85, Code of Alabama 1940.

It is stated as a matter of fact in your inquiry that the defendant pleaded guilty and was convicted in the Circuit Court for violating the "Uniform Firearms Act." The "Uniform Firearms Act" was originally enacted by Act No. 82, General and Local Acts 1936, Extra Session, page 52. This act was codified as Title 14, Sections 172-186, Code of Alabama 1940. These sections were last amended by Act No. 784, General and Local Acts 1951, page 1378. (Title 14, Sections 172-186, 1951 Cumulative Pocket Part, Code of Alabama 1940.) It has been held that the "Uniform Firearms Act" was intended as an entire revision of the subject matter contained in said Act, and laws inconsistent therewith were repealed. **Stinson v. State**, 28 Ala. App. 559, 90 So. 303.

The solicitor's fee of thirty dollars, referred to in your inquiry, is chargeable for convictions under Title 14, Sections 161, 164 and 165, Code of Alabama 1940. Although these latter sections prohibit the carrying of certain weapons, it is my view that unless it clearly appears that the conviction was under one of those sections, the thirty-dollar solicitor's fee provided for in Section 85, supra, should not be charged.

Since it clearly appears from your inquiry that the conviction was under the said "Uniform Firearms Act," and that the punishment involved was a misdemeanor, I am of the opinion that Section 85, supra, does not provide a special solicitor's fee for such conviction, but that the fee of ten dollars "for each conviction of a misdemeanor, not otherwise provided for," is applicable.

Yours very truly,

SI GARRETT
Attorney General

January 14, 1954

Hon. H. A. Kelley
City Councilman
City of Florala
Covington County
Florala, Alabama

Municipalities—Officers and Offices—Elections.

Vacancies in the office of mayor in cities of less than 6,000 inhabitants must be filled according to Title 37, Section 428, Code of Alabama 1940, as amended by Act No. 604, General and Local Acts 1951, page 1041, and, therefore, cannot be filled by a special election.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of October 6, 1953, is as follows:

"I am councilman of the City of Florala. Due to the ill health of Mayor H. G. McDaniel he is considering resigning from his post of duty in the near future. As I understand the Code of Alabama, this vacancy will be filled by the vote of the City Council. I would like to have your official opinion as to whether there is any way that we can hold an election so that the voters may decide the question of filling the post of Mayor instead of having it filled by the City Councilmen."

In my opinion, a vacancy caused by the resignation of the Mayor of the City of Florala cannot be filled by an election, but must be filled as provided by statute.

The city of Florala, Alabama, according to the 1950 Federal Decennial Census, has a population of 2,713. In cities of less than 6,000 population, vacancies in the office of mayor are filled according to the provisions of Title 37, Section 428, Code of Alabama 1940, as amended by Act No. 604, General and Local Acts 1951, page 1041. This section, as amended, *supra*, provides in part as follows:

"... In cities of less than six thousand inhabitants, and in towns, in case of the absence or disability of the mayor, the functions of the office shall be exercised by the chairman *pro tempore* of the council, and during his absence or disability, by such person as the council may appoint from its membership, which appointment must be entered upon the minutes of the council. In the event of a vacancy from any cause, in the office of mayor, the council shall fill the vacancy either from its own membership or from without the membership of the council. The person elected by the council to fill the vacancy in the office of mayor shall be a qualified elector in the municipality and must meet all other legal qualifications required by law for the performance of the duties of the office to which elected. . ."

See also, Quarterly Report of Attorney General, Vol. 52, page 306.

In view of the fact that the statute specifically provides for the filling of vacancies in the office of mayor, it is my opinion that the provisions of the statute must be followed. Of course, this excludes the possibility of a special election to fill such vacancy.

Yours very truly,

SI GARRETT
Attorney General

January 15, 1954

Hon. Bill Dorrough, Commissioner
Department of Public Welfare
CAPITOL

State Training School for Girls—Juvenile Court.

1. The parole board of the State Training School for Girls has authority to grant paroles and discharges under Title 52, Section 571, Code of Alabama 1940, as amended by Act No. 171, General Acts 1945, page 295.
2. The granting of a parole or discharge is not a ministerial duty, but a duty involving discretion, and cannot be delegated.
3. Legal custody of any girl, committed through a juvenile court, remains with the school until the girl is legally discharged.

Opinion by Assistant Attorney General Lee.

Dear Sir:

Your request for an official opinion, bearing date of November 17, 1953, is as follows:

"Under Title 52, Section 580, Code of Alabama 1940, the State Department of Public Welfare is given certain responsibilities with respect to the State Training School for Girls. Further, under Act 171, General Acts of Alabama 1945, Page 295, approved June 23, 1945, the Commissioner of Public Welfare is made a member of the Board of Trustees of the State Training School for Girls. In connection with this department's responsibilities and my position on the board, and in view of some apparent confusion with respect to parole procedure and situations with respect to legal custody under Title 52, Sections 570-584, Code of Alabama 1940, I am requesting your formal opinion concerning the following matters. First, who may grant paroles? Further, I would like to know what authority, if any, the Board of Trustees has over the Executive Board with respect to paroles. Is there any way in which authority can be delegated to one person—such as the superintendent—to grant paroles?

"I would appreciate your advice concerning the legal status of a runaway girl with respect to the matter of custody. Specifically, if a girl runs away from the State Training School and is not located, what is the status of custody after thirty days have elapsed? If legal custody is still with the State Training School, would it be

possible for the Executive Board to grant parole to such girls in order to relieve the State Training School of custody? If such a course is not the legislative intent would you advise whether the superintendent may request the Juvenile Court which awarded custody to the school to terminate the legal custodial relationship."

It seems clear that only the executive committee has authority to grant paroles. Title 52, Section 571, Code of Alabama 1940, as amended by Act No. 171, General Acts of 1945, page 295, states in part as follows:

"... (15) The executive committee composed of four members of the board from Jefferson County shall constitute the parole board and shall have full and complete power to grant paroles and discharges"

The board of trustees has no authority over the executive committee, hereinafter referred to as the parole board, with respect to paroles and discharges. Full and complete authority is granted to the parole board to grant paroles and discharges.

Subsection (4) of Section 1 of Act No. 171, supra, provides:

"... (4) There shall be an executive committee of the board of trustees, which committee shall be composed of the four members of the board of trustees from Jefferson County, who shall perform such duties as may be imposed by the board or may be prescribed by law"

The duties concerning parole and discharge are duties prescribed by law and not duties delegated or imposed by the board of trustees.

Further, the parole board is not authorized to delegate the power to grant paroles and discharges to some other person, officer, or group of persons. In addition to being clothed with "full and complete power" to grant paroles and discharges as set out in Section 571, as amended, supra, it is further indicated that the Legislature intended the parole board itself to grant paroles and discharges. Title 52, Section 576, Code of Alabama 1940, provides in part as follows:

"§ 576. Discharge, parole, transfer and escapes.—(1) The parole board may grant an honorable discharge or parole to any girl in their custody who, in their opinion, is ready for discharge or parole. The superintendent may make recommendations to the parole board for the discharge or parole of any girl whom she deems worthy and entitled to same. Before making such recommendation the superintendent must show that a satisfactory investigation has been made of the home, place or persons to whom the girl to be discharged or paroled is to be sent. . . ."

These provisions indicate that the responsibilities and authorities

of the superintendent and the parole board are differentiated with respect to the matter of paroles. The superintendent may make recommendations to the parole board that a girl be paroled or discharged. It is the function of the parole board to grant honorable discharge or parole. The determination of a matter of this nature requires deliberation and judgment. It is a duty involving the exercise of discretion and, therefore, cannot be delegated. **Board of Education of Marshall County v. Baugh**, 240 Ala. 391, 199 So. 822.

With respect to the matter of legal custody, Title 52, Section 575, Code of Alabama 1940, provides as follows:

“§ 575. Custody and time of stay in the school. When a girl is committed to the State Training School for Girls, the institution shall stand in loco parentis to such girl and shall have the exclusive care, custody and control of the child under such rules and regulations as the board of trustees may provide. All girls admitted to the State Training School for Girls may be kept there, disciplined, instructed, and trained under the direction of the board of trustees until they become twenty-one years of age or are legally discharged, paroled, or transferred.”

The legal custody of any girl committed through juvenile court proceedings pursuant to Chapter 7, Title 13, Code of Alabama 1940, remains with the school until the girl is legally discharged. If the girl runs away from the State Training School for Girls and is not apprehended, legal custody remains with the school, unless the parole board grants an honorable discharge to the girl. In any instance, where the girl is finally discharged, the committing court must be notified in writing in accord with Title 13, Section 361, Code of Alabama 1940.

It appears that the legislative intent, with respect to granting paroles or discharges, is that both parole and discharge should be granted as a result of good conduct or general improvement. Thus, the words “honorable discharge or parole” are used in Section 576, supra. Further, the role of superintendent under this section is to make a recommendation to the parole board concerning any girl “whom she deems worthy and entitled to same.”

If the parole board, under the circumstances you mention (when a girl runs away from the school and is not found), does not determine that the girl should receive an honorable discharge, the superintendent may request the proper juvenile court to terminate the legal custodial relationship.

Yours very truly,

SI GARRETT
Attorney General

January 15, 1954

Hon. Thomas G. Gayle
County Attorney
Dallas County
Selma, Alabama

Counties—Judges of Probate—Records—Dallas County.

When the probate judge is on a salary basis because of a constitutional amendment, and the county governing body is authorized to expend funds for the efficient operation of the probate office, said governing body is authorized to purchase microfilm records of deeds and mortgages kept in the office of the probate judge for security purposes.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of November 11, 1953, is as follows:

"The County Board of Revenue of Dallas County, Alabama, desires to purchase from the Dallas County Abstract Company a roll of micro-film covering deed and mortgage records from Volume 228 through Volumes 454, for the purpose of preserving the records.

"The room where the records of Dallas County are kept is not a modern, fire-proof room and a microfilm of these records would be valuable to the County in the event of the mutilation or destruction of the records by fire or water. This microfilm would be stored in a safe deposit box in a bank in the city of Selma, Alabama, or it is possible that it could be stored with the Department of Archives and History, Montgomery, Alabama.

"The cost to the County of obtaining this film would be less than one-half than what it would cost the county to microfilm these records. This was brought about by the fact that the County can now obtain a print of the film from the Dallas County Abstract Company, who has photographed all of the records. It is the plan of the County, in the future, to photograph the remaining records.

"Assuming that the County Board of Revenue passes the proper resolution authorizing the purchase of the film, would this be the proper expenditure of the County Board of Revenue? We would appreciate very much your rendering this opinion to the County Board of Revenue of Dallas County, Alabama, at the very earliest possible date."

It is in my opinion that your inquiry should be answered in the affirmative. That is to say, the Court of County Revenues of Dallas County may, in its discretion, purchase for the use of the office of probate a roll of microfilm covering deed and mortgage records of volumes now deposited and kept in the office of the Judge of Probate of Dallas County.

The Judge of Probate of Dallas County, by virtue of a constitutional amendment, receives a salary for his services rather than fees. Amendment XLVI, Constitution of Alabama 1901, proclaimed ratified November 15, 1940.

This amendment requires the probate judge, along with certain other officers, to collect all fees, commissions, allowances, etc., and to pay same into the country treasury.

Pursuant to the constitutional amendment, *supra*, the Legislature has enacted a local law authorizing the Court of County Revenues of Dallas County "to expend from the general fund of the County, for efficient operation of the offices of Judge of Probate . . . (and other officers) . . . and for increasing the salaries or compensation of the clerks . . . any amounts deemed to be reasonable and necessary by the said Court of County Revenues of Dallas County, Alabama." (Parenthetical matter added.) Act No. 215, General and Local Acts 1951, page 487.

It is to be noted, therefore, that the Probate Judge of Dallas County is now on a salary basis rather than a fee basis. He is required to pay his fees into the county treasury, and, by the provisions of Act No. 215, *supra*, the county governing body is authorized to expend from the general fund necessary amounts "for the efficient operation" of the office of probate judge. This office has heretofore held that when a probate judge has been placed on a salary as a result of a constitutional amendment, and the county governing body is authorized, under a local act, to pay necessary expenses for the operation of the office, such county governing body may purchase necessary supplies or equipment to be used in the probate judge's office. See Quarterly Report of Attorney General, Vol. 55, page 27 (intercommunication system); also Quarterly Report of Attorney General, Vol. 55, page 26 (city directory).

By analogy, it is my view that under the authority of Act No. 215, *supra*, the county governing body is authorized to determine whether or not the purchase of the above-mentioned microfilm is necessary for the "efficient operation" of the office of the Judge of Probate of Dallas County.

In my opinion, the Court of County Revenues of Dallas County may, in its discretion, determine that the purchase of said microfilm is necessary in connection with the safekeeping or preservation of the records required to be kept in the office of the Probate Judge of Dallas

County. See Title 47, Section 97, Code of Alabama 1940; and Title 13, Section 280, subsection 3, Code of Alabama 1940.

Very truly yours,

SI GARRETT
Attorney General

January 15, 1954

Hon. J. B. Davis
Mayor, City of Dothan
Houston County
Dothan, Alabama

Licenses—Municipalities—Insurance.

Title 28, Section 117, Code of Alabama 1940, as amended by Act No. 314, General Acts 1943, page 305, does not take away the authority of the city to levy an annual privilege license, against mutual insurance companies, other than life, as provided in Title 37, Section 736-739, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of September 24, 1953, is as follows:

"Request is hereby made for your written opinion upon the following question:

"Does the 1943 amendment of Section 117, Title 28, Code of Alabama, 1940, exempt any mutual insurance company, organized in or admitted to this State, from liability for annual privilege license levied by a city for the privilege of doing business in such city? In other words, does such amendment take away the authority of a city in Alabama to levy an annual privilege license under the authority granted in Section 735-739, Title 37, Code of Alabama, 1940, as to mutual insurance companies?

"An early reply will be appreciated."

When the Code of Alabama 1940 was adopted, it contained the following provisions:

Title 28, Section 117, applying to mutual insurance companies, other than life, which is as follows:

"Taxes and fees paid by mutual insurance companies. — The taxable premiums or premium receipts of any mutual insurance company organized in or admitted to this state under this article for the purpose of premium taxation anywhere in this state, shall be the gross premiums received during the preceding calendar year for insurance upon property or risks in this state or in the municipalities thereof, as the case may be, from which there shall be deducted return premiums, amounts paid for reinsurance upon which a tax has been or is to be paid to the state, and returns to policy holders other than for losses and such premium taxes shall be payable on or before March first in the following year. The following and no other fees and taxes shall be payable by such mutual insurance companies: The franchise tax based on the amount of capital actually employed in the state; the usual certificate or license fee for each soliciting agent; and the annual license and filing fee, fire marshal tax and usual gross premium tax. The above fees and taxes shall be paid to the state. Municipalities may also collect a privilege or license tax on gross premiums at such rate, **not higher than the state rate on gross premiums** as may be hereafter fixed by ordinance. The usual ad valorem tax or real and personal property shall also be paid by such mutual insurance companies." (Emphasis supplied.)

Title 37, Sections 736-739, which authorized municipalities to collect license fees or privilege taxes from all insurance companies doing business in such municipalities, based upon a percentage of the gross premiums on policies issued on property or to citizens of such municipalities.

Title 51, Sections 816 and 820, which provided, in part, that insurance companies doing business in the State should pay to the State a license fee or privilege tax based upon a **smaller percentage of gross premiums** than provided in Sections 736-739, *supra*.

It may be observed that during the period when all the above statutory provisions were effective, there was an inequality of tax rates favoring mutual insurance companies, other than life. During the said time, municipalities were not permitted to collect a license fee or privilege tax from such mutual insurance companies in conformity with the provisions of Sections 736-739, *supra*, but were limited by the provisions of Sections 816 and 820, *supra*, because of the wording of Section 117, *supra*.

Act No. 314, General Acts 1943, page 305, amended Section 117, *supra*, by omitting therefrom only the following portion:

". . . The above fees and taxes shall be paid to the state. Municipalities may also collect a privilege or license tax on gross premiums

at such rate, not higher than the state rate on gross premiums as may be hereafter fixed by ordinance. . .”

From a consideration of the statutory provisions herein-above cited, and the inconsistency therein, it is my opinion that the obvious purpose of the amendment was to allow municipalities to collect from mutual insurance companies, other than life, the license fees or privilege taxes as provided in Sections 736-739, *supra*.

Having dealt at some length with the purpose of Act No. 314, *supra*, I shall now endeavor to answer the question propounded by you. Did the Legislature, in amending Section 117, *supra*, repeal Sections 736-739, *supra*, as to mutual insurance companies, other than life?

Only when two statutes are so repugnant to each other that it must be presumed that the Legislature intended that the latter should repeal the former, will a repeal by implication be found to exist; and where there is a reasonable field of operation by a just construction of both statutes, both will be given effect. **Bates et al. Commissioners of Mobile v. State ex rel. Conniff**, 240 Ala., 609, 200 So. 779.

It will be noted that the amendment not only removed from Section 117, *supra*, the sentence containing a limitation placed upon municipalities in collecting a license fee or privilege tax from mutual insurance companies, other than life, but also removed therefrom the following sentence: “The above fees and taxes shall be paid to the state.” This sentence had placed upon the enumeration of fees and taxes immediately preceding it a restricted construction or interpretation. The removal of this interpretative explanation has the effect of making the portion of the statute to which it applied subject to construction by the use of general rules of statutory interpretation.

The rule is well recognized that, in the construction of a statute, the legislative intent is to be determined from a consideration of the act as a whole, and not from only a portion thereof. **Alabama Power Company v. Director of Industrial Relations**, 36 Ala. App. 218, 54 So. 2d 786; cert. den. 256 Ala. 382, 54 So. 2d 789. Consideration should also be given to other statutory provisions. **Birmingham Paper Company v. Curry**, 238 Ala. 138, 190 So. 86.

Applying these fundamental rules of statutory construction to Section 117, as amended, *supra*, it would appear that a municipal license or privilege tax was contemplated by the inclusion therein of the reference to municipalities in the first sentence of said statute. In view of the fact that there are statutes authorizing the levy and collection by municipalities of certain license fees or privilege taxes (Sections 736-739, *supra*) from insurance companies, it is my conclusion that such municipal license fees or privilege taxes are necessarily within the purview of the following portion of Section 117, as amended, *supra*:

" . . . The following and no other fees and taxes shall be payable by such mutual insurance companies: The franchise tax based on the amount of capital actually employed in the State; the usual certificate or license fee for each soliciting agent; and the annual license and filing fee, fire marshal tax and usual gross premium tax. . . ."

It is my opinion that the statutes here considered are in harmony; therefore, Act No. 314, *supra*, amending Section 117, *supra*, does not repeal Sections 736-739, *supra*, as to mutual insurance companies, and the said Act does not exempt such mutual insurance companies from license fees or privilege taxes imposed under the authority of Sections 736-739, *supra*.

Any construction of Section 117, as amended, *supra*, which would lead to an opposite conclusion than the one reached herein, would certainly raise a question of the constitutionality of said statute under Constitution of Alabama 1901, Section 221.

Yours very truly,

SI GARRETT
Attorney General

January 21, 1954

Hon. Herman K. Longshore
Judge of Probate
Lauderdale County
Florence, Alabama

Taxation—Deeds—Mortgages—Filing Tax.

1. A mortgage to the First Federal Savings and Loan Association of Florence, Alabama, is subject to a mortgage filing tax when offered for recordation.
2. Mortgage in certain amount, including clause making security in mortgage applicable to future indebtedness of mortgagor to mortgagee, wherein mortgagor incurs all indebtedness recited in mortgage, is not governed by Title 51, Section 619(b), Code of Alabama 1940, as amended by Act No. 770, General and Local Acts 1953, page 1031.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of October 16, 1953, is as follows:

"The First Federal Savings and Loan Association of Florence has presented to me for recording a mortgage which provides that the mortgage shall secure the payment of any other or further sums which might thereafter be advanced by the mortgagees to the mortgagors, according to the terms of re-payment agreed upon as effectually as if said amounts had been advanced before or at the time of the execution of said mortgage. The mortgage also provides that no advances will be made in any event which would make the principal sum of the indebtedness greater than the total amount named in said mortgage. Blank copy of the mortgage form used by the Association is enclosed herewith.

"In practice the Association, while not obligated to make any further advances to the mortgagor, may at its option make additional loans to the borrower, as the mortgage is paid down, so long as the total amount owed does not exceed the face amount of the mortgage. In other words, if the face of the mortgage reads \$7,000.00 the Association will advance the borrower \$7,000.00 at the time of the execution of the mortgage. If the mortgage is paid down to \$6,000.00 then the Association might, under the terms of the mortgage, and without the execution of any further mortgage, lend the borrower an additional \$1,000.00.

"If the Association presents to me a mortgage as in the above example together with the proper recording fees based on a \$7,000.00 mortgage, can I record said mortgage without having the Department of Revenue ascertain the required amount of taxes as provided in Title 51, Section 619(B) Code of Alabama, and as amended by Act No. 770 approved September 17, 1953?

"The Association has referred me to the case of *Prestridge et al. v. Gary*, 36 So. (2d) 328, wherein the Supreme Court stated—"that the provisions in question were designed to cover blanket mortgages or deeds of trust executed for securing bonded indebtedness in which the proceedings authorizing such indebtedness furnishes full data for ascertaining the amount of the indebtedness and a reasonable basis for calculation of the tax."

"They maintain that, therefore, under their so-called 'open end' mortgage they are not required to comply with said statute, for in the words of the Supreme Court, ' . . . there is no other instrument authorizing the mortgagor or debtor to incur any further indebtedness under the mortgage in question, nor is there any basis or data for ascertaining the amount of any future indebtedness covered by the mortgage.'

"I shall appreciate your considering this matter and providing me with an opinion at your earliest convenience."

Before reaching the question raised in your inquiry, it should first be considered whether or not a deed or mortgage to a Federal Savings and Loan Association is subject to the filing tax levied by Title 51, Section 618, Code of Alabama 1940, as amended by Act No. 769, General and Local Acts 1953, page 1029, and Title 51, Section 619, Code of Alabama 1940, as amended by Act No. 770, General and Local Acts 1953, page 1031.

A local savings and loan association, organized under the provisions of Title 5, Section 211 et seq., Code of Alabama 1940, is subject to the filing tax levied by Sections 618 and 619, as amended, *supra*. Quarterly Report of Attorney General, Volume 55, page 150; Quarterly Report of Attorney General, Volume 60, page 40. Although a Federal Savings and Loan Association is a federal instrumentality, the United States Congress, by the statute under which an association is organized, has permitted states to impose any tax "on such association" which is not greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions. 12 U.S.C.A. 1464 (h). This office has held that a filing tax is due on the recordation of mortgages and deeds to a Federal Savings and Loan Association under the provisions of Sections 618 and 619, *supra*. Quarterly Report of Attorney General, Volume 16, page 252; Quarterly Report of Attorney General, Volume 60, page 40.

Section 619(b), as amended by Act No. 770, *supra*, provides, insofar as here pertinent, as follows:

"(b) If any part of the indebtedness which the mortgagor or debtor in any other instrument is authorized to incur under the terms of the instrument has not been, or will not be, presently incurred, at the time such instrument is offered for record, the tax shall be paid on the amount of indebtedness presently incurred, as the department of revenue, upon the petition of the owner of any such instrument, or upon the petition of the agent or attorney of such owner, shall ascertain to its own satisfaction the amount then taxable, and the amount to be incurred thereafter, and determine the amount upon which the tax shall be paid at the time such instrument is offered for record, and shall endorse its findings on such instrument . . ."

The blank copy of the mortgage form enclosed with your request provides, in part, as follows:

"It is expressly understood and agreed that this mortgage shall secure the payment of any other or further sums which may be hereafter advanced by mortgagee to mortgagors, according to the terms

of repayments agreed upon, as effectually as if said amounts had been advanced before or at the time of the execution of these presents. In the event of default in the payment of any such advancement, according to the terms of repayment agreed upon, the mortgagee may foreclose this mortgage in the same manner as herein provided.

* * * * *

"It is understood and agreed by and between the Mortgagee and the Mortgagors that: It is the intent and purpose of this mortgage to secure the payment of the above note whether the entire amount shall have been advanced to the Mortgagors at the date hereof, or at a later date, or having been advanced, shall have been repaid in part and further advances made at a later date, which advances shall in no event operate to make the principal sum of the indebtedness greater than the amount named in said obligation plus any amount or amounts that may be added to the mortgage indebtedness under the terms of the immediately preceding paragraph."

A question similar to that presented here was involved in the case of **Presridge et al v. Garry**, 251 Ala. 181, 36 So. 2d 328. The mortgage involved in that case secured an indebtedness of \$3,500.00, evidenced by three promissory notes, and provided:

"... Now, therefore, in consideration of the premises and one dollar paid to the undersigned on the delivery of this instrument, and in further consideration of said indebtedness, and to secure the prompt payment of the same as it respectively matures, and the punctual payment of all other debts the aforesaid debtor may now owe or **hereafter incur with the said above named mortgagee** up to the time this mortgage is cancelled of record and to secure the faithful performance of all promises and agreements herein named . . .' (Italics supplied.)"

The mortgage was duly executed and acknowledged on July 24, 1945, and filed for record on August 18, 1945, at which time the recording fee of \$2.50 and the mortgage tax of \$5.25 were paid. From time to time during the period from July 24, 1945, to April 8, 1947, additional advancements or loans were made by the mortgagee under said mortgage aggregating \$4,500.00. In holding that Section 619(b), *supra*, was not applicable to the mortgage involved, the Court stated:

"The argument is that there is no **other instrument** authorizing the mortgagor or debtor to incur any further indebtedness under the mortgage in question, nor was there any basis or data for ascertaining the amount of any further indebtedness covered by the mortgage. That the provisions in question were designed to cover blanket mortgages or deeds of trust executed for securing bonded indebtedness in which the proceedings authorizing such indebtedness furnishes full data for ascertaining the amount of indebtedness and a reasonable basis for calculation of the tax.

"We are of opinion that this contention is sound and that the decree overruling the demurrer to the bill is free from error."

It is, therefore, my opinion that if the Federal Savings and Loan Association presents to you a mortgage for \$7,000.00, using the form referred to, with the proper recording fee based on a \$7,000.00 mortgage, such mortgage should be recorded without having the Department of Revenue ascertain the amount of taxes as provided in Section 619(b), as amended, *supra*.

Yours very truly,

SI GARRETT

Attorney General

January 22, 1954

Hon. H. M. Gilley, Jr.

Ex Officio Clerk, County Court

Marshall County

Guntersville, Alabama

Marshall County—Inferior Courts—County Courts—Game and Fish—Department of Conservation—Fines—Forfeitures—Funds—Highway Patrol—Public Safety Department.

All fines and forfeitures accruing in cases in the County Court of Marshall County for the violation of the pertinent provisions of Title 36, Code of Alabama 1940, where the arrest is not made by the sheriff, his deputies, or other county or municipal law enforcement officer, and in cases for the violation of the game and fish laws, or for the violation of rules and regulations promulgated thereunder, shall be forwarded to the State Treasurer, for deposit by him in the State Public Highway and Traffic Control Fund, and to the Director of the Department of Conservation, respectively.

Opinion by Assistant Attorney General Bradley.

Dear Sir:

Your request for an official opinion, bearing date of December 18, 1953, is as follows:

"I am the Circuit Clerk of Marshall County and by virtue of my office I am also the Clerk of the County Court of Marshall County.

This court was created by an Act of the Legislature, approved June 3, 1953, was House Bill No. 245 and Act 51 of the 1953 Session of the Legislature.

"Section 19 of the above referred to Act of the Legislature reads as follows:

"Section 19. Payment of Fines, etc. That all fines and forfeitures accruing from the prosecution and trial of criminal cases in this Court shall be paid into the fine and forfeiture fund of Marshall County.'

"I have heretofore paid such fines to Marshall County with the exception of fines assessed and forfeitures made final and collected in cases made by the State Highway Patrolmen and in cases made by the State Game Wardens. In all cases made by the State Highway Patrolmen I have heretofore paid to the State Treasury such fines and forfeitures for the use of the Department of Public Safety and in all cases made by the State Game Wardens, if collected, I have heretofore paid to the State Department of Conservation. A question has arisen as to whether or not the local act above referred to, Section 19, now requires me to pay all of these fines into the County Fund of Marshall County.

"Will you please give me your opinion as to whom I should pay such fines to, whether to the Fine and Forfeiture Fund of Marshall County, or, in cases made by the Highway Patrolmen to the State Treasury for the use or credit of the Department of Public Safety and in cases made by the State Game Wardens to the State Department of Conservation to the credit of the Game and Fish Department of Alabama. Please give me your opinion as early as possible because I am afraid to pay them to anyone until you give me your opinion for fear I might be liable in paying it to the wrong party and I am now withholding such payments in the future until I receive your opinion."

Title 36, Section 53, Code of Alabama 1940, is as follows:

"§53. Fines and forfeitures. —All fines and forfeitures collected upon conviction or upon forfeiture of bail of any person charged with a violation of any of the provisions of this chapter constituting a misdemeanor, shall be within thirty days after such fine, or forfeiture is collected forwarded to the treasurer. All amounts received from such fines or forfeitures shall be credited to the highway patrol fund. Failure, refusal or neglect to comply with the provisions of this section shall constitute misconduct in office and shall be ground for removal therefrom. Provided that all fines and forfeitures collected by recorders courts or other municipal courts for violation of ordinances, in cities and towns of over two thousand

population according to the last or any subsequent census, whether for acts constituting violations of the provisions of this chapter or not, shall be paid into the treasury of such municipality in which the same was collected."

Section 1 of Act No. 298, General Acts 1945, page 494, is as follows:

"Section 1. That all of the fines and forfeitures, which hereafter may be paid by any person or persons, convicted in any court of competent jurisdiction of violations of the rules and regulations promulgated by the State Highway Commission, concerning the operation of motor vehicles upon the highways of this State, and of violations of the Alabama Highway Code, where the person or persons thus convicted have been arrested by the Sheriff, or his deputies, or by any other county or municipal law enforcement officer authorized and qualified to make such arrests, shall be paid into the general fund of all counties that do not have a fine and forfeiture fund and into the fine and forfeiture fund of the counties that have a fine and forfeiture fund in which the offense was committed and shall be controlled and disbursed as other general funds and fine and forfeiture funds in the respective counties."

It will be noted from the two above quoted provisions of law that all fines and forfeitures collected in cases for violations of the pertinent provisions of Title 36, Code of Alabama 1940, are to go to the State Treasurer to be credited by him to the Highway Patrol Fund, except in those cases where the arrest is made by the sheriff, his deputies or other county or municipal law enforcement officer. Act. No. 585, General and Local Acts 1953, page 828, changed the name of the Highway Patrol Fund to the State Public Highway and Traffic Control Fund, and directed that all monies in the Highway Patrol Fund be transferred to the newly created fund.

Title 8, Section 47, Code of Alabama 1940, provides as follows:

"§ 47. Jurisdiction of offenses; disposition of fines. —Justices of the peace of the inferior criminal courts of the counties of the State of Alabama shall be and are hereby given final jurisdiction to try and convict persons, firms or corporations violating any of the provisions of the game and fish laws, or the rules and regulations promulgated thereunder; and they shall remit to the director on or before the first day of each month all fines and forfeitures collected by them for the violation of such laws, rules and regulations, as prescribed in the game and fish laws, together with a statement of the name of the person, firm or corporation convicted of such violation, the time of such conviction, the amount of the fine or penalty, the date of the remittance, and the specific charge for which the defendant was tried."

This section provides that the fines and forfeitures collected by justices of the peace and inferior courts of the State for violations of the game and fish laws, or the rules and regulations promulgated thereunder, shall be forwarded to the Director of the Department of Conservation.

Section 19 of Act No. 51, General and Local Acts 1953, page 61, is as follows:

"Section 19. Payment of Fines, etc. —That all fines and forfeitures accruing from the prosecution and trial of criminal cases in this Court shall be paid into the fine and forfeiture fund of Marshall County."

The Supreme Court of Alabama, in the case of **Cherokee County, Alabama et al v. W. H. Cunningham, as Ex-Officio Clerk, etc.**, 7th Div. 215 (Ms.), rendered November 12, 1953, in a factual situation almost identical with the one contained in this opinion, said that, although the two sections, one from the general law and one from the local law, appeared to be in conflict, they were not in conflict and would be given separate fields of operation. The Court further stated, as follows:

"The principle is succinctly stated in **Downing v. City of Russellville**, 241 Ala. 494, 3 So. 2d 34: 'It is elementary that, if there be apparent conflict between general laws, and those dealing with a specific subject, the general law yields to the special. Both are given effect, so as not to conflict.' In **Miller v. State, ex rel. Peek**, 249 Ala. 14, 29 So. 2d 411, 172 A. L. R. 1356, we said:

"'Special provisions relating to specific subjects control general provisions relating to general subjects. The things specially treated will be considered as exceptions to the general provisions,'" and further quoting from **City of Birmingham v. Southern Express Co.**, 164 Ala. 529, 51 So. 159, 'When a specific subject has been specially provided for by law, it will not be considered as repealed by a subsequent law which deals with a general subject in a general way, though the specific subject and the special provisions may be included in the general subject and general provisions. —**Parker v. Hubbard**, 64 Ala. 203; **Montgomery v. B. & L. Assn.**, 108 Ala. 336, 18 So. 816.'

"In the instant case §§ 25 and 43 of the Cobb Act are general provisions of § 53, Title 36, which section is considered as an exception to the above noted general provisions of the Cobb Act and being 'otherwise expressly provided' for under § 392, Title 15. See also *Ex parte Jones*, 212 Ala. 259, 102 So. 234; *Herring v. Griffin*, 211 Ala. 225, 100 So. 202.

"The interpretation by the Attorney General and popular interpre-

tation as exemplified in practice for a number of years will be given weight as a factor in judicial construction of a statute where its meaning is doubtful. —**Shepherd v. Sartain**, 185 Ala. 439, 64 So. 57; **State v. Stone**, 237 Ala. 83, 185 So. 404; **Jefferson County v. Great Atlantic & Pacific Tea Co.**, 237 Ala. 103, 185 So. 766; **State v. Tuscaloosa Building & Loan Ass'n.**, 230 Ala. 476, 161 So. 530. These interpretations are cited in the numerous annotations following § 53, Title 36, in the 1940 Code, and for aught appearing, the fines payable to the state have been so paid by the Clerk of Cherokee Law and Equity Court from the time of its creation in 1943 to the time of the filing of this suit in 1951.

"Aside from the popular interpretation, there is the expression of legislative intent which is exemplified in the enactment of section 53 (1), Title 36 in 1945, and the re-enactment in effect of both sections in the 1953 legislative session. Act No. 585, approved September 11, 1953.

"Another rule of construction is that 'statutes should have a rational, sensible construction, if their meaning is at all doubtful.'—**Shepherd v. Clements**, 224 Ala. 1, 141 So. 255. And paraphrasing the language of the court following the statement last quoted, and applying it to the case at bar, we would say: It would seem unreasonable that the lawmakers should require that fines for the violation of the 'Rules of the Road' should be kept in Cherokee County but would require the fines in courts from surrounding counties to be sent to the State Treasurer for the support of the highway patrol. We can see no basis in reason or common sense for such a distinction. But we think it clear the above noted legislative acts evidenced the intent of the lawmakers that they should be applicable throughout the state in all counties, and all fines for violation of the rules of the road made by highway patrolmen should be paid to the State Treasurer, and that practice should be uniform to all courts of such counties."

Therefore, Section 19 of Act No. 51, *supra*, is a general provision on a general subject, and Section 53, *supra*, and Title 8, Section 47, Code of Alabama 1940, are special provisions on specific subjects. Hence, Section 53, *supra*, and Section 47, *supra*, are not repealed by Section 19 of Act No. 51, *supra*.

It is my opinion that all fines and forfeitures accruing from cases arising under the pertinent provisions of Title 36, *supra*, in the County Court of Marshall County, when the arrest is not made by the sheriff, his deputies, or other county or municipal law enforcement officer, shall be forwarded to the Treasurer of the State of Alabama, and shall be credited by him to the State Public Highway and Traffic Control Fund.

It is my further opinion that all fines and forfeitures collected by the County Court of Marshall County for the violation of the game and fish laws, or for the violation of rules and regulations promulgated thereunder, shall be forwarded to the Director of the Department of Conservation as prescribed by Section 47, supra.

Very truly yours,

SI GARRETT
Attorney General

January 26, 1954

Hon. C. C. Horton
State Service Commissioner
Department of Veterans' Affairs
Post Office Box 1509
Montgomery 2, Alabama

Judges of Probate—Costs and Fees—Records—Veterans—
Military and Naval Affairs.

An honorable discharge from military service must, if presented to the probate judge for recording under the provisions of Title 60, Section 51, Code of Alabama 1940, be so recorded without charge for either the recording or the affixing to the instrument of the certificate of recordation.

Opinion by Assistant Attorney General Sanders.

Dear Sir:

Your request for an official opinion, bearing date of December 28, 1953, is as follows:

“Reference is made to your opinion to Honorable Lecile Gray, Judge of Probate, Walker County, Jasper, Alabama, dated December 8, 1953, concerning application of Acts Nos. 769 and 770, General Acts 1953, both approved September 17, 1953, amending Sections 618 and 619, respectively, of Title 51, Code of Alabama 1940, and Act No. 281, General Acts 1953, approved August 6, 1953, amending Section 97 of Title 47, Code of Alabama 1940.

“This Department would appreciate an official opinion as to whether or not your opinion of December 8, 1953, has any applicability to Section 51 of Title 60, Code of Alabama 1940. In other words, in view of the provisions of Section 51 and the provisions of the

Acts enumerated in the first paragraph of this letter, is it your opinion that any type of fee is required for the recording of an honorable discharge from the armed services.

"As many boys are presently being discharged from the service, may we request your opinion as soon as conveniently possible."

The opinion of this office to which you refer (rendered to Hon. Lecil Gray, Judge of Probate, Walker County, under date of December 8, 1953) dealt with the question of fees allowable to judges of probate under three different statutes enacted by the 1953 Legislature.

The opinion held, among other things, that probate judges are entitled to a twenty-five cent fee for a "certificate without seal of office" for making the certificate on tax-exempt deeds and mortgages that no deed or mortgage tax has been collected, as required by the provisions of Title 51, Section 618, as amended by Act. No. 769, General and Local Acts 1953, Page 1029, and Title 51, Section 619, as amended by Act No. 770, General and Local Acts 1953, page 1031, respectively. This portion of the opinion obviously has no relevance to the subject matter of your request.

The opinion further held that probate judges are entitled to the twenty-five cent fee for "certificate without seal of office" for making the certificate of recordation on all instruments required to be recorded, by virtue of Act No. 281, General and Local Acts 1953, page 346, amending Title 47, Section 97, Code of Alabama 1940. This section, as amended, requires judges of probate, upon payment of the fees of registration, to record, in large and well-bound books, "conveyances of property and all other instruments authorized to be recorded," and to certify upon each such instrument when it was received and recorded, and in what book and page it is recorded. The amendatory Act provides that, for making such certificate, the probate judge shall be entitled to the fee for "certificates without seal" set forth in Title 11, Section 29, Code of Alabama 1940 (as amended in respects not here material). Section 97, *supra*, therefore, as now amended, makes applicable to the recordation of instruments two separate fees, namely, the recording fee of fifteen cents for each one hundred words and the twenty-five cent certificate fee for the certificate of recordation, each of which fees is set forth in Section 29, as amended, *supra*.

Title 60, Sections 50-52, Code of Alabama 1940, pertains to the recordation by probate judges of honorable discharges from military service. Section 51 of this Title provides:

"§ 51. Recordation of honorable discharge.—Any person who holds an honorable discharge from the United States army, navy or marine corps may present the same to the probate judge of the county wherein he or she may reside, and the probate judge shall cause

the same to be recorded in the book described in section 50 of this title, **and there shall be no fee charged for this service.**" (Emphasis supplied.)

This section clearly makes the honorable discharge an "instrument authorized to be recorded." It is my opinion, however, that no fee may be charged by the probate judge for the service of recording it, because of the splendid specific prohibition against such fees contained in the emphasized portion of the section quoted above. This being a specific statute, relating to the recording of a specific type of instrument, the provisions of said statute must control and take precedence over general provisions relating to general subjects, even though the general statute was enacted after the special one. **City of Birmingham v. Southern Express Co.**, 164 Ala. 529, 51 So. 159; **Herring v. Griffin**, 211 Ala. 225, 100 So. 202; **Miller v. State**, 249 Ala. 14, 29 So. 2d 411. See also Quarterly Report of Attorney General, Vol. 40, page 54.

Section 97, supra, as now amended by Act No. 281, supra, incorporating by reference the general fees allowable to judges of probate set forth in Section 29, as amended, supra, deals with all instruments authorized to be recorded and thus falls within the category of a general statute. It cannot, therefore, be construed as authorizing a fee for the recording of honorable discharges which are, by specific statute, entitled to recordation free of charge. The "service" of recording mentioned in Section 51, supra, must be deemed to include the affixing of the certificate of recordation, since that act was already required in the case of all recorded instruments (Section 97, supra). Consequently, the subsequent amendment provided by Act No. 281, supra, which added no new service but merely provided that a separate fee was allowable for this certificate, cannot, since it deals generally with all recorded instruments, nullify the prohibition against fees for the entire service of recording military discharges.

You are advised, therefore, that the fees allowable under Section 97, as amended by Act No. 281, supra, are not charges and such discharges are to be recorded by the probate judge, and the certificate of recordation made thereon, without any charge for this service.

Very truly yours,

SI GARRETT
Attorney General

February 2, 1954

Hon. James F. Hester
Judge of Probate
Franklin County
Russellville, Alabama

Counties—Publications—Newspapers.

The compensation to be paid for the publication of receipts and disbursements of county governing bodies provided for in Title 12, Section 22, Code of Alabama 1940, is now governed by the provisions of Act. No. 793, General and Local Acts 1953, page 1086.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of January 23, 1954, is as follows:

"The Franklin Citizen Times, a newspaper of general circulation published at Russellville in this county, has presented to the Board of Revenue its claim for \$107.38 for publishing the six months Financial Statement of the county authorized by Title 12 of Section 22 of Code of Alabama, 1940. The printer has called our attention to Act No. 793, approved September 19, 1953, and especially the following language contained in the Act 'When any matter or material is required to be published in tabular form, the rate to be charged and paid shall not exceed the nationally published rate.' The publication is in the form in which the Financial Statement was presented to the printed; that is to say, the printer used the same form of arrangement, etc., that the statement was made up in, which is the same form that the statement had been published in for over twenty years, which the printer states is in tabular form and that his charge is in accordance with nationally published rate. We enclose a copy of the published report.

"Please advise whether or not the claim is allowable under Act No. 793, and oblige."

In answer to your inquiry, it is my opinion that the compensation to be paid for the publication of receipts and disbursements of county governing bodies provided for in Title 12, Section 22, Code of Alabama 1940, is now governed by the provisions of Act No. 793, General and Local Acts 1953, page 1086.

Your inquiry involves the question of whether the rates provided for official publications in general under Act No. 793, *supra*, are applicable to publications required under Section 22, *supra*.

In my judgment, this query should be answered in the affirmative. Act No. 793, *supra*, provides as follows:

"Section 1. The raets herein established shall apply to any and all legal notices, advertisements, publications, statements, or other matter of whatever kind or character required by the Constitution of Alabama, or by general, local or special law or rules or orders of courts to be published in newspapers in this State whether the agency required to cause the publication to be made is an individual, officer, municipality, county, the State, governmental sub-division, or any other legal entity; provided that rates herein established shall not apply when a local law prescribes a different rate, in which event said local law shall be applicable.

"Section 2. Newspapers of this State shall not charge, nor shall any agency required to cause publication to be made pay, more than two cents a word for the first insertion and one and one-half cents a word for each subsequent insertion; provided that the current published commercial rate may be contracted for when the publication is made in a daily newspaper. When any matter or material is required to be published in tabular form, the rate to be charged and paid shall not exceed the nationally published rate.

"Section 3. In estimating the number of words in a publication an appropriate caption may be included, but any memorandum of the printer must be excluded; and each amount or number expressed in figures and each initial letter shall each constitute one word; the year, month, and day shall each constitute one word, or three words together.

"Section 4. **All laws or parts of laws in conflict herewith, except local laws fixing different rates, are hereby repealed and superseded.**" (Emphasis supplied.)

Although the amount of compensation to be paid for the publication provided for in Section 22, supra, is limited to one and one-half cents per word in counties of less than 40,000 population, this limitation is superseded by the provisions of Act No. 793, supra. The emphasized protions of this Act, as above set out, clearly evince a legislative intent that it is all inclusive with the exception of local acts prescribing different rates.

Recognizing the rule that the presumption is that a general Act does not repeal a special or local statute, such presumption must give way to a plain manifestation of a different legislative intent. Where a clear intent of the Legislature is to establish a uniform system throughout the State, the presumption is that special or local statutes are repealed by general statutes. **Shepherd v. Clements**, 224 Ala. 1, 141 So. 255. Such is the situation with respect to the statutes under consideration with the exception of local acts specifically applicable.

Yours very truly,

SI GARRETT
Attorney General

February 3, 1954

Hon. J. C. Grady
Judge of Probate
Chambers County
LaFayette, Alabama

Licenses—License Tags—Motor Vehicles.

1. In order to be eligible for the three-dollar license and registration fee provided for by Act No. 775, General and Local Acts 1953, page 1046, a pick-up truck must have a box or express type of body, and a pick-up truck with a stake body is not eligible under said Act.
2. Owners of pick-up trucks who have procured improper licenses must obtain proper tags and pay the penalty for delinquency.

Opinion by Assistant Attorney General Sanders.

Dear Sir:

Your request for an official opinion, bearing date of January 14, 1954, is as follows:

“Re: Act No. 775.

“When the above act was passed it was understood by this office that pick-up trucks with panel bodies were not eligible for passenger tags, however, we considered a stake bodied truck, i. e., on closed cab truck, with flat body on which side bodies may be put on or taken off, as eligible for the \$3.00 tag.

“On November 4, 1953, in an opinion to the Hon. Bradley Brown, director of Department of Revenue of Jefferson County, you set out in the 4th paragraph that panel bodies nor stake bodies were eligible. Then on December 31, 1953, in an opinion to the Hon. Cecil Gray, Judge of Probate of Walker County, you stated in the last paragraph that pick-up trucks were ‘trucks constructed with an open body and a closed cab’ which certainly answers the description of a stake body truck.

“Considering that we have issued the wrong tag in this office by the varied interpretations of this act, should we charge these people who purchased the wrong tags even though at that time both this office and the purchaser thought they were right. Our license inspector is issuing citations to these people and we are holding these citations

pending an opinion from you.

"P. S. We know and understand that the purchaser is responsible for having the right license, but since this act has been interpreted several ways it seems hardly right that we should charge a penalty and citation in these cases."

There is no conflict between the two opinions to which you refer no inconsistency in their interpretation of the Act which establishes license and registration fee of three dollars for a certain type of motor truck (Act No. 775, General and Local Acts 1953, page 1046). The Act provides, in part:

"Section 1. Any other provisions of law to the contrary notwithstanding, the license and registration fee on motor vehicles designated as motor trucks which have a box or express type body of three-fourths of a ton capacity or less, and commonly known as 'pick-ups' or 'pick-up trucks' shall be Three Dollars (\$3.00). Provided, however, any applicant for such motor vehicle license shall, upon making application for same, execute, under oath, a statement in writing to the officer issuing such license reciting that such applicant is the owner of the vehicle and that such vehicle is the only mode or method of transportation owned by the applicant or available for his use in the household in which the applicant resides."

The first opinion, which was rendered to Hon. Bradley Brown, Director, Department of Revenue, Jefferson County, under date of November 4, 1953, held, among other things, that trucks having a panel body or a stake body could not qualify under the Act, even though they met the Act's other requirements as to capacity, use, and ownership, because the Act applies only to trucks with a "box or express type body." The opinion stated that the box type of body and the express type of body are one and the same thing; that this type of body is the one commonly found on pick-up trucks; and that a panel body or a stake body is something entirely different.

The second opinion, rendered to Hon. Lecil Gray, Judge of Probate, Walker County, under date of December 31, 1953, likewise held among other things, that panel trucks and the sedan delivery type of motor vehicle do not qualify under the Act, even though its other requirements are met, because, again, such vehicles have a closed body and not a "box or express type body." In support of this conclusion it was stated that pick-up trucks "are constructed with an open body and a closed cab." This statement is correct; it obviously should not be interpreted, however, as holding that **any** truck with an open body and a closed cab is a pick-up truck which can qualify under the Act. In addition to the requirement as to capacity, such a truck must have a "box or express type body" and must be of the sort commonly known as a "pick-up truck."

A "stake body" truck of the sort to which you refer may also be called a "pick-up truck," but it is constructed or manufactured with a flat or platform body which ordinarily extends at the sides out over the wheels and upon which the "sides" are formed by means of stakes, usually removable. It thus has a greater loading area than a box or express type pick-up truck, the body of which does not extend out over the wheels. I am informed that the pick-up trucks of some manufacturers may be equipped with either type of body, as the purchaser desires, but the chassis and cab are identical in both cases. A "stake body" truck, in other words, even though it may be a pick-up truck, does **not** have a "box or express type" body, and consequently does not come within the purview of Act No. 775, supra; this was one of the holdings of the opinion first mentioned above.

For the guidance of officials administering this Act, I will again set forth the characteristics which motor trucks must have in order to meet the requirements of the Act:

1. The truck must have a box or express type of body. This means that the body, as originally constructed, was open but not flat and the cab was closed. The body was constructed with permanent sides which are raised above the truck bed to a height which varies somewhat among different trucks, according to the make and the purpose for which the truck is designed; ordinarily this height is at least one and one-half or two feet. Such a truck usually has a hinged tailgate, of the same height as the sides, which may be lowered to permit easier loading. Frequently the height of slats, stakes or boards; such equipment may be factory-designed but removable, or may merely have been improvised by the owner from materials at hand. (In this connection I think it appropriate to say that alteration by the owner, in the form of additions to the body of the truck to make it more suitable for his particular needs—even to the extent of fashioning a roof or top over the truck bed—would not remove the truck from the scope of the Act, provided that the truck was originally constructed as a pick-up truck as herein described and provided that the alteration has not changed its essential characteristics as such.)

2. The truck must have a capacity of three-fourths of a ton or less.

3. The truck must be of the type commonly known as a "pick-up" or "pick-up truck." In other words, it must conform to the description given in 1 and 2, above. This does not mean, however, that all trucks designated as "pick-ups" will qualify under the Act. Those with stake bodies will not.

4. The applicant for the license must execute, under oath, a statement in writing reciting that he is the owner of the vehicle and that such vehicle "is the only mode or method of transportation owned by the applicant or available for his use in the household in which the applicant resides."

If you have issued improper licenses to the owners of stake body

trucks, or any other type of vehicle, the license inspector should, of course, follow the statutory procedure of notification and citation prescribed by Act No. 577, General Acts 1943, page 579, amending Title 51, Section 708, Code of Alabama 1940. Furthermore, the owner of the vehicle has been delinquent in procuring the proper license, and, therefore, the penalty for delinquency and, where applicable, the citation fee will attach, as prescribed in Title 51, Section 835, Code of Alabama 1940, as amended by Act No. 610, General and Local Acts 1951, page 1053. This section makes it unlawful for the probate judge to fail to collect the penalty when he issues the license.

After the penalty and citation fee have been collected and turned over to the license inspector, however, I know of nothing which would prohibit him—the license inspector—if he so desires and is not compensated on a salary basis, from returning such penalty and citation fee to the vehicle owners who have paid them.

Very truly yours,

SI GARRETT
Attorney General

February 3, 1954

Hon. R. G. Parker
Sheriff, Tuscaloosa County
Tuscaloosa, Alabama

Bail—Bonds—Sureties—Corporations.

Corporations organized under the general incorporation laws of the State, with authority to do a bonding business, do not necessarily come within the exception to the qualifications of bail required for each person engaged in the business of making bonds and charging therefor, as provided for in Title 15, Section 201, Code of Alabama 1940, as amended by Act No. 199, General and Local Acts 1949, page 230. The proviso, "except corporations qualified to do a bonding business in this State," as used therein, applies to those qualified with the Superintendent of Insurance under Title 41, Chapter 2, Article 4 (Sections 98-114), Code of Alabama 1940.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of November 5, 1953, is as follows:

"Re: Approval of Bail Bonds by Sheriff

"Will you please give me your opinion of the law on the questions raised in this letter?

"In the City of Tuscaloosa there are three bonding companies incorporated in Tuscaloosa County under the authority of Chapter 1, Title 10, 1940 Code of Alabama. According to their Certificates of Incorporation these companies are authorized to make bonds in criminal cases of all types and in civil cases not prohibited by law and to engage in a general bonding business to the extent not prohibited by law. These three companies are: The Tuscaloosa Bonding Company, Inc., with \$2,000.00 authorized capital stock and \$1,000.00 capital stock subscribed and paid in; H & C Bonding Company, Inc., \$2,000.00 authorized capital stock with \$2,000.00 capital stock subscribed and paid in; and the City Bonding Company, Inc., with \$2,000.00 authorized capital stock and \$1,000.00 capital stock subscribed and paid in. I have approved many bail bonds made by these companies, and I have been informed that at least one of these companies has made Administrator's Bonds and other bonds in civil court proceedings in Tuscaloosa County. As far as I know, none of these companies is qualified to do a bonding business other than that business authorized by the General Incorporation Law cited above.

"In its report dated October 15, 1953, the Grand Jury of Tuscaloosa County severely criticized the operation of these three bonding companies because of their low capitalization and the comparatively small amount of capital stock subscribed and paid in. The Grand Jury alleged that the amount of the liability of these companies far exceeds their resources.

"The Grand Jury report stated, in part, that 'The sheriff's attention has been called to this iniquitous situation and he promises speedily to correct it.'

"As I understand the law, Section 201, Title 15, Criminal Procedure, 1940 Code of Alabama sets forth the requirements that must be met by any person engaged in the business of making bonds and charging therefor. I understand that this section does not apply to corporations qualified to do a bonding business in this state. Section 201 requires any person doing a bonding business to furnish a \$10,000.00 bond with a qualified corporate surety to be approved by the Probate Judge. I wonder whether there is any corresponding provision in Alabama law regarding the qualifications of a corporation to engage in the same kind of business. It appears that Sections 98, 99, and 114, of Title 41, Officers and Offices, 1940 Code of Alabama, may apply to this situation. Would you please answer the following questions:

"1. Should I continue to approve bail bonds made by any of the above bonding Companies as long as they are organized as described above?

"2. Are the above described bonding companies qualified to make bail bonds, administrator's bonds, and so forth, under the law of Alabama?

"3. Must an individual, not a corporation, engaged in the business of making bonds and charging therefor furnish a \$10,000.00 bond as provided in Section 201, Title 15, 1940 Code of Alabama?

"4. Do the requirements in Sections 98 and 99 of Title 41, 1940 Code of Alabama, apply to the above described companies?"

Your inquiries involve an interpretation of Title 15, Section 201, Code of Alabama 1940, as amended by Act No. 199, General and Local Acts 1949, page 230, which provides as follows:

"Section 201. Qualifications of bail.—The qualifications of bail are, that each must be a resident of this state, and a householder and freeholder therein, and that each must be worth, exclusive of property exempt from execution, the amount expressed in the undertaking provided however that each person, engaged in the business of making bonds and charging therefor, **except corporations qualified to do a bonding business in this State**, shall, in addition to all other requirements of this section, be required as a part of the qualifications of bail to furnish bond with a corporate surety authorized to act as surety on bonds in this State in the amount of Ten Thousand dollars to be approved by the Probate Judge of the county in which such person is to engage in the business of so making bonds, said bond to be conditioned to guarantee the payment of all sums of money that may be due to the State of Alabama or any political subdivision thereof by virtue of any judgment absolute being rendered against said person or persons as surety on said bonds; but the court, magistrate, or office, in taking bail, may allow more than two persons to justify severally as bail in amounts less than that expressed in the undertaking, provided the whole be equivalent to two sufficient bails, or the court, magistrate, or officer, in taking bail, in lieu of the foregoing, may allow a corporation, foreign or domestic, qualified to do a bonding business in this state, and authorized to execute the undertaking of bail, to execute such bail." (Emphasis supplied.)

In my opinion, the emphasized proviso, "except corporations qualified to do a bonding business in this State," applies only to those corporations qualified with the Superintendent of Insurance under the provisions of Title 41, Chapter 2, Article 4 (Sections 98-114), Code of Alabama 1940. An incorporation under the general incorporation laws of the State in accordance with Title 10, Chapter 1 (Sections 1-16), Code of Alabama 1940, as amended in part (Act No. 289, General and Local

Acts 1951, page 573; Act No. 797, General and Local Acts 1951, page 1395), with corporate powers to do a bonding business, would not of itself bring such a corporation within the exception in question.

The evident purpose of the security provisions of Section 201, as amended, *supra*, was to insure that in case of default the surety or sureties on the bail bonds would be financially responsible. Individual sureties must meet certain security qualifications. Persons (which includes corporations as well as individuals by virtue of Title 1, Section 2, Code of Alabama 1940) engaged in the business of making bonds and charging therefor, except corporations qualified to do a bonding business in this State, are required to give additional security. The only reason for excepting "corporations qualified to do a bonding business in this State" is that such corporations are otherwise financially secure under some other provisions of our statutes. These other provisions, in my judgment, are Title 41, Chapter 2, Article 4 (Sections 98-114), *supra*, dealing with bonds by guaranty companies. Section 98 specifically includes an administrator's bond. Section 114 provides that the article applies only to official bonds or bonds required by law to be approved by some authority designated therein, including any county office (as the sheriff).—Cf. **Fidelity & Deposit Co. of Maryland v. Goodwyn**, 231 Ala. 44, 163 So. 341. A bail bond is certainly one to be approved by an authority designated therein.

To hold that the phrase, "except corporations qualified to do a bonding business in this State," included any corporation with corporate powers to do a bonding business, regardless of the amount of its authorized capital stock and financial worth or other qualifications, would nullify the protective features of assured payments by sureties on bail bonds in cases of default. Such, in my opinion, was not the legislative intent.

In view of the above, I am of the opinion that your first and second inquiries should be answered in the negative, and your third and fourth inquiries in the affirmative.

Very truly yours,

SI GARRETT
Attorney General

February 11, 1954

Hon. T. C. Almon,
Judge of Probate,
Morgan County,
Decatur, Alabama.

Elections—Registration—Boards of Registrars—Municipalities.

1. Act No. 6, General and Local Acts 1951, page 45, prohibiting registration of persons as qualified electors within ten days prior to any primary, special, or general election, does not apply where election is a municipal election, either general or special.

2. Under Act No. 6, *supra*, registration of persons as qualified electors within ten days prior to any primary, special, or general election is prohibited only in cases where said elections are county-wide or state-wide in scope.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of February 3, 1954, is as follows:

"The town of Austinville, a municipal corporation in Morgan County, lies adjoining and contiguous to the City of Decatur.

"The Mayor and Councilmen of the town of Austinville, after a petition had been presented to them containing the required number of qualified electors have called an election in the town of Austinville for the 23rd day of February, to determine whether or not the town of Austinville shall consolidate with and become a part of the City of Decatur.

"Under the general laws of the State of Alabama, applicable to Morgan County, the Board of Registrars meet at the Courthouse for the purpose of registering persons who are qualified to become voters, on the first and third Monday of each month.

"By an Act of the Legislature, Special Session, 1950, page 45, Volume 1, I find this: 'The board of registrars in the several counties of the state shall not register any person as a qualified elector within ten days prior to any **primary, special** or **general** election.'

"The next regular session of the Board of Registrars in Morgan County on the third Monday in February will be February 15th, the Special Municipal election called by the town Council of Austinville has been set for Tuesday, February 23rd. There will not be ten days intervening between the next meeting of the Board of Registrars and the Special Municipal election.

"In the Code of Alabama when elections are spoken of, the verbiage is usually **PRIMARY, SPECIAL, GENERAL** or **MUNICIPAL** election. Under the quotations from the above Act, you will notice that the word Municipal or Special Municipal is omitted.

"Will you please give me the benefit of your official opinion on these questions:

"First: Can the Board of Registrars of Morgan County, Alabama, legally register voters in Morgan County on February 15th, 1954?

"Second: Can a person who resides within the corporate limits of the town of Austinville register on February 15th, to become a qualified voter in order to vote in the Special Municipal election to be held in Austinville on February 23rd?

"Third: Can the Board of Registrars of Morgan County meet on February 15th and register persons who are qualified to vote in Morgan County, but exclude from registration any person who lives within the corporate limits of the town of Austinville?

"It has been generally circulated throughout the county and in Austinville that persons who were otherwise qualified could register the first and third Monday of each month before any election and vote in that election.

"I am sure that there are persons living in the town of Austinville who have the qualifications and have paid their poll tax but have failed to register who will present themselves for registration on February 15th.

"At the last session of the Board of Registrars which was Monday, February 1st, there was such a crowd seeking to register that the three members of the Board were unable to accomodate all of them and some were turned away and told to come back the third Monday in February.

"It will be necessary that I have the benefit of your official opinion before the 15th of February in order to give the public notice of this session of the Board of Registrars so a prompt reply will be appreciated."

It is provided in Section 1 of Act No. 6, General and Local Acts 1951, page 45, as follows:

"The boards of registrars in the several counties of the state shall not register any person as a qualified elector within ten days prior to any primary, special or general election. Whenever the day for any authorized meeting of the board of registrars falls within such ten day period on which to hold such meeting."

Throughout our election laws, certain specific provisions are made with reference to general, primary, special, and municipal elections.

By Act No. 465, General Acts 1945, page 699, the regular municipal elections in cities and towns are held on the third Monday in September, 1948, and quadrennially thereafter. Under this Act the expenses of any municipal election, general or special, are paid out of the treasury of such municipality.

It is a matter of common knowledge that these elections are referred to in common speech as **municipal** elections, either general or special.

When the Legislature made provisions for absentee voting by Act No. 424, General and Local Acts 1949, page 601, the intent to make the law applicable to municipal elections was made clear by providing that the provisions thereof "shall apply to all primary, general, special, and **municipal elections**." (*Italics supplied.*) So it is with many other provisions of our election laws when it is intended to make them applicable to municipal elections.

It is my opinion, therefore, that the Legislature would have expressly included municipal elections by naming them along with primary, special, or general elections had it intended for the provisions of Act No. 6, *supra*, to apply to them. By not so doing, the registration of persons as qualified electors in a county where a municipal election is being held is not prohibited by the provisions of Act No. 6, *supra*.

It is my further opinion that, by not including municipal elections within the provisions of Act No. 6, *supra*, the Legislature intended that the registration of persons as qualified electors should be prohibited within ten days prior to any primary, special, or general election only in cases where said elections are either county-wide or state-wide in scope.

If the election is county-wide, involving only one county, then the board of registrars in that county only would be prohibited from registering voters within the ten-day period.

If the election is state-wide, all the boards of registrars in all the counties would be prohibited from registering voters within said ten-day period.

If the election is not state-wide, but is one in which several counties participate, then only the boards of registrars in the several counties participating would be prohibited from registering voters within the ten-day period.

The effect of this holding is to say that the election of February 23 by the town of Austinville does not prevent the Board of Registrars of Morgan County from registering generally, on February 15, 1954, all

who are qualified to so register.

Yours very truly,

SI GARRETT,
Attorney General.

February 11, 1954

Hon. Robert E. L. Key
Circuit Solicitor
21st Judicial Circuit
Evergreen, Alabama

Game and Fish—Justices of the Peace—Appeals—Solicitors.

It is not mandatory upon solicitor to file a complaint in an appeal from a justice court to the circuit court following conviction for violation of game and fish law; however, solicitor's complaint may be filed to cure amendable defects in original affidavit.

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for an official opinion, bearing date of December 14, 1953, is as follows:

"Section 358 et seq. of Title 15 of the 1940 Code which relate generally to appealed cases from inferior courts to the circuit court provide that trial of such cases in the circuit court shall be **de novo** and upon a written complaint signed by the solicitor in a prescribed form.

"Section 60 of Act 240 of the 1935 Legislature which appears in the 1940 Code as Section 56 of Title 8, and which relates to the trial of cases involving violations of the fish and game laws, provides that on appeal from a judgment of conviction to the circuit court from a justice of peace court or other inferior court the cause shall stand for trial **de novo** on the original affidavit and warrant.

"Since it has been held in the case of *Windham vs. State*, 35 Ala. App. 547; 50 So. 2d 288, that it was not error for the solicitor to fail to file the written complaint prescribed by Section 363 of Title 15, it will be much appreciated if you will give me your opinion of the following questions suggested by the conflicting provisions of the cited statutes:

"1. Did the legislature intend by the enactment of Section 56 of Title 8 of the 1940 Code that all appealed cases involving fish and game law violations be tried in the circuit court only on the original affidavit and warrant?"

"2. Where a case involving a violation of the fish and game laws is based on an original affidavit, not absolutely void but subject to demurrer, is tried in a justice of peace court and conviction is had, upon appeal to the circuit court is the solicitor precluded from filing a written complaint which will state a valid cause of action?"

I am of the opinion that both of your inquiries should be answered in the negative. The reasons on which I base my opinion are as follows:

Title 8, Section 56, Code of Alabama 1940, is as follows:

"§ 56. Right of jury trial.—In any prosecution for misdemeanor before a justice of the peace or other inferior court, under and by virtue of the provisions of the game and fish laws, the defendant shall not have the right of a jury trial, except on appeal to the circuit court or court of like jurisdiction, but the said justice of the peace or other inferior court having jurisdiction shall proceed with the trial, and if the defendant is convicted he may appeal to the circuit court or other court of record of like jurisdiction in the county having jurisdiction in cases of appeals from such justice of the peace, or other such inferior courts, and cases so appealed shall, without the intervention of or investigation by a grand jury, be docketed in such circuit court or other court of like jurisdiction, and stand for trial *de novo*, on the original affidavit and warrant and on the trial of such appealed cases the defendant shall be entitled to and may demand a jury."

The other statute involved in this opinion is Title 15, Section 363, Code of Alabama 1940, which is as follows:

"§ 363. Trial of appeal *de novo*; statement of cause of complaint.—The trial in the circuit court shall be *de novo*, and without any indictment or presentment by the grand jury; but the solicitor shall make a brief statement of the cause of complaint signed by him, . . ."

Section 56, *supra*, was enacted subsequent to Section 363, *supra*, and controls.

In the case of **Windham vs. State**, 35 Ala. 547, 50 So. 2d 288, it was held that where a prosecution for violating the State game and fish law had its inception in a justice of the peace court, and from the judgment of conviction an appeal was taken to the circuit court, failure of the solicitor to file written complaint in the circuit court was not error.

The intoxicating liquor laws which were enacted by the Legislature were also passed subsequent to Section 363, *aupra*, and prosecutions under those laws are not controlled by it.

In prosecutions for violation of the prohibition law, it was not essential, although permissible, for the Solicitor to file a complaint on appeal from the county court to the circuit court, since the statute relating to prosecutions under the prohibition law superseded the statute making ordinary trial in the circuit court *de novo* based on a complaint signed by the prosecutor. **Lewis vs. State**, 27 Ala. App. 528, 175 So. 565.

In porsecutions for violating the prohibition law, an amendment, on appeal to the circuit court of an affidavit on which defendant was tried in the county court, has been held not to be reversible error. **Richardson vs. State**, 21 Ala. App. 639, 111 So. 202.

The general law is well stated in the case of **Nailer vs. State**, 18 Ala. App. 127, 90 So. 131, that, where in a prosecution originating in the county court, the solicitor, on appeal to the circuit court, files a complaint, such complaint becomes the charge against defendant based on the original affidavit; and where the affidavit filed in the county court as the basis of the prosecution is not absolutely void, the complaint based thereon in the circuit court is amendable, so as to cure any inaccuracies or irregularities.

It was also held, in the csae of **Freeland vs. State**, 26 Ala. App. 74, 153 So. 294, that the original affidavit, on which trial was had in the justice court, not being void, the complaint based thereon in the circuit court, which tries the case *de novo* on appeal from judgment of conviction, may state the charge so as to cure any amendable defects.

From the above authorities, it appears that, although it is not mandatory upon the solicitor to file a complaint in an appeal from a justice court to the circuit court following a conviction for violating the game and fish law, he may do so in order to cure amendable defects rather than rely upon the original affidavit.

Yours very truly,

SI GARRETT
Attorney General

Hon. Reo Kirkland,
Judge of Probate,
Escambia County,
Brewton, Alabama.

February 15, 1954

Counties—Escambia County—Municipalities—Licenses—
Words and Phrases.

Under Act No. 575, General and Local Acts 1953, page 818, East Brewton was, on July 1, 1953, levying a license tax on dealers in malt or brewed beverages within the meaning of said Act, and, therefore, is entitled to share in the proceeds of the county-wide tax imposed on such dealers in Escambia County by said Act.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of January 26, 1954, is as follows:

"Enclosed is a copy of a letter dated January 21, 1954, which I have received from attorneys representing East Brewton demanding for East Brewton participation in the distribution of the proceeds of the privilege tax on beer levied by Act No. 575 enacted by the 1953 Legislature, applying to Escambia County. The facts are accurately stated in the letter from East Brewton's attorneys.

"There is a citation of Perry County vs. Selma M & M R. Co. 58 Ala. 546, 559, which declares that the **levy** of taxes is the legislative function which declares the subjects and rate of taxation. If that is the proper definition applicable to the Act in question, it would seem that East Brewton is entitled to participate.

"Heretofore, distribution of the proceeds of the tax among the municipalities has been made on the 11th and 20th of each month. Having received this demand from East Brewton, I cannot safely disturb the tax proceeds distributable to municipalities until it is determined whether East Brewton is entitled to participate. It is therefore urgent that I have your official opinion on this question at your earliest convenience."

The Legislature of Alabama, by Act No. 575, General and Local Acts 1953, page 818, levied a license or privilege tax on each seller of malt or brewed beverages in an amount equal to three cents on each twelve fluid ounces, or fractional part thereof, of malt or brewed beverages sold, distributed, delivered, stored, or taken out of storage within Escambia County, Alabama.

After deducting the expenses incurred in the administration and enforcement of the Act and the commission allowed to the probate judge, the remainder of the proceeds of the tax is distributed as follows: Sixty per cent to be prorated among the municipalities within the county which were levying a tax on malt or brewed beverages as of July 1, 1953, upon the basis of their respective populations according to the federal census; and forty per cent to be prorated among the city and

county boards of education for educational purposes on the basis of the previous year's net enrollment of pupils.

After the effective date of the Act, the tax levied therein was to be the only license tax on dealers in malt or brewed beverages in Escambia County, and any local laws or municipal ordinances imposing a license tax on dealers in malt or brewed beverages in said county were expressly repealed.

The question presented here relates solely to the allocation of a part of the proceeds of the tax and the determination as to which municipalities are entitled to share therein.

It has been held that such allocation as is being considered here is purely legislative and not subject to review by the court, if it is based upon any sort of reasonable foundation. "The Court will not examine it with a critical eye or weigh too closely one claim against the other in order to fix a true balance." **Garrett v. Colbert County Board of Education**, 255 Ala. 86, 50 So. 2d 275.

It is gathered from your request and the accompanying letter from Hon. Howard J. Kearley, Attorney for East Brewton, that on July 1, 1953, the municipalities of Atmore, Brewton, and Flomaton were collecting a privilege or license tax on dealers in malt or brewed beverages, but East Brewton was not on that date collecting such a tax, although it had in effect on that date an ordinance levying a privilege or license tax on dealers in malt or brewed beverages. The reason that no tax was being collected was because no license had been taken out by any retail or wholesale dealers in malt or brewed beverages in the municipality of East Brewton.

When the Act is considered as a whole, it is clear that the sixty per cent allocation is to be among those municipalities which were levying a **license tax on dealers** in malt or brewed beverages as of July 1, 1953.

This brings me to a consideration of what the Legislature meant by the use of the word "levying" when it provided for a proration of a portion of the tax proceeds among the municipalities in the county which were levying a tax on malt or brewed beverages as of July 1, 1953.

In **Dunn v. Harris**, 144 Ga. 157, 86 S. E. 556, the Supreme Court of Georgia said:

"The word 'levy' is not always used with the same meaning. As applied to taxes, it sometimes has been used as meaning to raise and exact by authority of government, or to determine by vote the amount of tax to be raised. In some cases the word has been used with reference to the ministerial or executive act of enter-

ing taxes on the books and collecting them. There is, however, a difference between the levying of a tax and its assessment or collection. In *Emerc v. Alvarado*, 64 Cal. 592, 2 Pac. 418, it was said that 'levying a tax' usually means the fixing of the rate at which property is to be taxed, and that this is generally done by the Legislature, either mediately or immediately; that is to say, by the Legislature for the purpose of state taxation, and by the local governing boards, such as boards of supervisors, for local taxation, on which boards the power of levying taxation is conferred by the Legislature. In *Perry County v. Selma, etc., R. Co.*, 58 Ala. 546, 559, it was said:

"Levy and assessment have very different meanings. The levy of taxes is a legislative function, and declares the subjects and rate of taxation. * * * Assessment is quasi judicial, and consists in making out a list of the taxpayer's taxable property, and fixing its valuation or appraisement. * * * The distinction is the difference between prescribing a rule of action and administering that rule to persons and subjects that fall within its provisions.'"

From what has been said above, it is my opinion that "levying" is not used in the sense of "collecting," and that East Brewton was, on July 1, 1953, levying a license tax on dealers in malt or brewed beverages within the meaning of Act No. 575, supra, and is, therefore, entitled to participate in the distribution of the proceeds of the tax levied by said Act.

Yours very truly

SI GARRETT
Attorney General

February 17, 1954

Hon. Chester Walker, Chairman
Board of Revenue
Tuscaloosa County
Tuscaloosa, Alabama

Counties—Tuscaloosa County—Merit System.

The Board of Revenue of Tuscaloosa County is without authority to prescribe vacation and sick leave privileges for the employees in the classified service of Tuscaloosa County, but such leave may be provided for by the Civil Service Board.

Opinion by Assistant Attorney General Bradley.

Dear Sir:

Your request for an official opinion, bearing date of February 5, 1954, is as follows.

"The Board of Revenue of Tuscaloosa County has passed a resolution providing that all permanent classified employees of the Road and Bridge Department of Tuscaloosa County shall be entitled to ten paid work days sick leave annually and that sick leave shall be allowed to accumulate at the rate of ten days per year for a total of three years, the maximum days accumulated as sick leave never to exceed thirty days and also providing that all permanent classified employees of the Road and Bridge Department of Tuscaloosa County be granted and allowed ten paid working days vacation time annually, subject to the right of the Department Head or Foreman to determine and designate the time to be allowed as vacation time for each employee under his supervision.

"The Board of Revenue of Tuscaloosa County will appreciate your opinion as to whether it has the legal power to pass such resolution and to grant these sick leave and vacation privileges and benefits to the permanent classified employees of the Road and Bridge Department.

"We will greatly appreciate your opinion on the above matter."

Act No. 357, General and Local Acts 1949, page 524, provides for the establishment of a civil service system for certain county employees in Tuscaloosa County. Further, it provides for the creation of a Civil Service Board, and prescribes its duties and powers. One of those powers is as follows:

"Section 6 . . . The board shall establish rules and regulations governing dismissals, suspensions, layoffs, terminations and leaves of absence, and the severance of an employee's relationship with the county shall be in accordance with such rules and regulations . . ."

In an opinion of this office directed to the Hon. Charles F. Hackmeyer, Member, Board of Revenue and Road Commissioners, Mobile County (Quarterly Report of Attorney General, Vol. 53, page 72), the following is found:

"Of course, those employees in the classified service of the Mobile County Civil Service System (Act No. 470, *supra*) have their vacation and sick leave privileges established by the rules of the Personnel Board, for the reason that Section IX, subsection (c) of the local act, *supra*, provides, 'among other things, such rules shall provide . . . the hours of work, attendance regulations, and leaves of absence for employees in the classified service; . . .'"

It will be noted that the pertinent portion of the statute referred to in the above opinion is almost identical with the pertinent portion of Act No. 357, supra. Therefore, it follows that only the Civil Service Board is authorized to prescribe vacation and sick leave privileges for the employees in the classified service of Tuscaloosa County.

It is my opinion that the Board of Revenue of Tuscaloosa County is without authority to prescribe vacation and sick leave privileges for the employees in the classified service, but the Civil Service Board of the county may do so.

Yours very truly

SI GARRETT

Attorney General

February 19, 1954

Hon. C. H. Keller, Register
Circuit Court
Cullman County
Cullman, Alabama

Registers—Costs and Fees—Insane Persons.

1. The register is required to hold a reference to fix the responsibility for the cost of the care, support, and maintenance of each inmate of state mental institutions whether such inmate was committed to said institution prior or subsequent to the passage of Act No. 777 and Act No. 778, General and Local Acts 1953, pages 1048 and 1051, unless bond is executed according to said Acts.

2. The equity court, in rendering its order, may tax the costs of court, including costs of holding a reference to fix financial responsibility for the support of said inmates, against the parties responsible for such support.

3. The equity court may not tax costs against parties who agree to support said inmates and execute bond therefor.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion bearing date of December 31, 1953, is as follows:

"I would appreciate your official opinion at your earliest possible convenience on the following questions relating to Act No. 777, House Bill No. 909, approved September 19, 1953, entitled an Act 'To provide for the support and maintenance of mentally ill persons committed to the State Mental institutions, and providing for the enforcement of this Act, etc.'

"1. Does Section No. 1 include all persons committed to State Mental institutions prior to the enactment of said Act or only to such persons committed by the Judge of Probate of Juvenile Court committed subsequent to the enactment of said Act? In other words, is the Register required to hold reference on all the inmates committed to mental institutions from the County in which he is Register which have been referred to him by the County Director of Public Welfare who were inmates prior to the enactment of said Act or only such persons who have been committed subsequent to the enactment of said Act?

"2. Is there any provision whereby the Register or the Court may tax the cost of the proceedings had by the Register in connection with the provisions of said Act? Section No. 3 provides that the Court may enter judgment against persons held responsible for the care, support and maintenance of inmates of mental institutions and I am wondering if the Court could tax the cost of the proceedings, including the Register's fee, as a part of and in addition to the judgment. In cases where the parties responsible therefor agree to support such inmates and execute bond therefor, would the Register be authorized to tax and collect the cost of such proceeding against the parties agreeing to be responsible for such inmate?"

In answer to your first question, I should like to refer you to Act No. 778, General and Local Acts 1953, page 1051. This is the companion act to Act No. 777, General and Local Acts 1953, page 1048, which you cite. Act No. 778, *supra*, specifically provides support and maintenance liability with respect to inmates already committed to state mental institutions prior to the date of the enactment of Act No. 777, *supra*, and Act No. 778, *supra*. Thus, you will notice in Section 4 of Act No. 778, *supra*, the following:

"Upon receipt of the list of non-paying inmates of the state mental institutions committed from his county, accompanied by the report of the director of the county department of public welfare, the register of the circuit court shall hold references to fix the responsibility for the cost of the care, support, and maintenance of each inmate listed thereon and to determine the amount that each person responsible for such care, support and maintenance of an inmate of a state mental institution shall contribute toward the cost thereof. Provided, however, that no reference need be held in any case in which relatives or friends voluntarily agree to assume the cost of such inmate's care, support and maintenance in the state mental

institution and file with the register a bond, in conformity with the provisions of Section 6 hereof, guaranteeing the payment thereof”

It is therefore my opinion that Act No. 777, supra, is prospective in operation, applying to cases wherein inmates are committed after the effective date of said Act; while Act No. 778, supra, applies to cases wherein inmates had been committed prior to the effective date of Act No. 778, supra.

You further ask if there is any provision whereby the register or the court may tax the cost of the proceedings held by the register in connection with the provisions of said Act. There are no provisions for the taxing of costs in Act No. 777, supra, nor in Act No. 778, supra. It is well established that public officials are entitled only to such fees and costs as are expressly authorized. **Jefferson County v. Capanes**, 235 Ala. 449, 179 So. 637. However, Section 3 of Act No. 777, supra, and Section 4 of Act No. 778, supra, require the register to hold a reference and to make a report to the court. Prior to the time of holding said reference, the register must give reasonable notice to each of the parties. Equity Rule No. 79 (c), Rules of Practice, following Title 7, Code of Alabama 1940, page 1108. Any person determined to be liable at the reference is to be served with the report of the register pursuant to the provisions of Section 3 of Act No. 777, supra, and Section 4 of Act No. 778, supra. Under these provisions such relative is given an opportunity to except to the findings and an opportunity to be heard. The circuit court is authorized to enter a judgment against the relative or relatives determined to be liable, pursuant to Act No. 777, supra, and Act No. 778, supra. Equity Rule No. 112, Rules of Practice, following Title 7, Code of Alabama 1940, page 1122, provides, in part, as follows:

“Costs will be imposed by the court or judge having jurisdiction at such times during the litigation as he deems proper, subject to correction for improper exercise of his discretion, and may be apportioned by him between the parties;”

It appears, therefore, that the court, in rendering its order or judgment, may tax costs against those persons who have been notified and against whom judgment has been rendered.

Section 3 of Act No. 777, supra, and Section 4 of Act No. 778, supra, provide that a reference need not be held by the register if the relatives or friends of the patient or inmate voluntarily agree to support and maintain him. In this event bond must be given for the faithful performance of such agreement.

In the case of **Ex Parte Cudd**, 195 Ala. 80, 70 So. 721, it is stated that costs are a mere incident of the suit, and do not arise from any inherent power of the court to award them, but are granted only by virtue of express statutory authority. This is a well settled rule of law.

I am of the opinion that, in the event the parties responsible for the support of inmates execute bond therefor before a reference is held, the register will not be authorized to tax the costs of the proceedings against the parties who execute bond. In this event, it would seem that the proceedings are not of a judicial character and no judgment would be rendered against those who execute the bond. Therefore, Equity Rule No. 112, *supra*, would not be applicable; and there is no other statute or court rule authorizing the court, sitting in equity, to tax costs.

Very truly yours,

SI GARRETT

Attorney General

February 25, 1954

Hon. C. C. (Jack) Owen, President
Alabama Public Service Commission
C A P I T O L

Public Service Commission—Motor Carriers.

Under Section 2 of Act No. 669, General Acts 1939, page 1064 (Alabama Motor Carrier Act), as last amended by Act No. 265, General and Local Acts 1953, page 330, motor vehicles operating under a certificate or permit from the Alabama Public Service Commission are not subject to the general regulatory provisions of said Alabama Motor Carrier Act of 1939, if they are hauling exempt commodities only.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion, bearing date of October 29, 1953, is as follows:

“Section 2, subsection 3 of Alabama Motor Carrier Act of 1939, Act No. 669, Section 301 (2) of Title 48 of the Code of Alabama of 1940, provides that the act shall not be construed to apply to

“ *** motor vehicles if engaged in hauling milk, livestock, coal, logs, lumber, poles, pulpwood, cotton in bales or cotton seed, for a distance not exceeding 75 miles, or fertilizer when being hauled directly to a farm, for a distance not exceeding 150 miles; or trucks hauling road materials and paid by the State of Alabama, for a distance not exceeding 25 miles, and motor vehicles used exclusively in the transportation of milk in thermal or artificially cooled bodies

or containers for a distance not exceeding one hundred fifty miles; except this subsection shall not be construed to exempt from the provisions of this Act any motor carrier who operates under a certificate or permit granted under the authority of the Alabama Public Service Commission. ***

"In administering the motor carrier act, the Alabama Public Service Commission construed the quoted section as preventing a carrier holding a certificate or permit from the Commission from transporting the exempt commodities, maintaining that in transporting such commodities the carrier holding a certificate or permit was not relieved from any provisions of the motor carrier act.

"Act No. 265, General Acts of Alabama, regular session 1953, had the effect of amending the quoted provision above by amending section 2, apparently in its entirety, rewriting the same with certain changes. As concerns section 2, subsection A-2, Act No. 265, reads as follows:

" 'This Act shall not be construed to apply to: *** motor vehicles hauling materials and paid by the State of Alabama, for a distance not exceeding 25 miles, and motor vehicles used exclusively in the transportation of milk in thermal or artificially cooled bodies or containers for a distance not exceeding 150 miles; except that this subsection shall not be construed to exempt from the provisions of the Mileage Tax Act, Act No. 664, General Acts of Alabama 1939, as amended, any motor carrier who operates under a certificate or permit granted under the authority of the Alabama Public Service Commission. All motor vehicles hauling property for hire and exempt under Subsection A (3) of Section 2 must before transporting such property secure a permit from the Department of Revenue of the State of Alabama, which permit shall be furnished without cost upon proper application. Such permit shall be issued under reasonable rules and regulations promulgated by the Department of Revenue of the State of Alabama.'

"We would like your official opinion on this question. Under the present law may a carrier holding a certificate or permit from this Commission issued under Alabama Motor Carrier Act of 1939 transport with its trucks used under its said certificate or permit exempt commodities without complying with the regulatory provisions of Alabama Motor Carrier Act of 1939; also may such a qualified carrier engage in the transportation of exempt commodities without complying with the Alabama Motor Carrier Act of 1939, if using motor vehicles not qualified under its certificate or permit.

"It seems that Act No. 265 is intended to supersede in its entirety section 2 of the act itself."

Your request involves an an interpretation of an amendment to

Section 2 of the Alabama Motor Carrier Act of 1939 (Act No. 669, General Acts 1939, page 1064 (Title 48, Section 301 (2), 1951 Cumulative Pocket Part, Code of Alabama 1940)) contained in Act No. 265, General and Local Acts 1953, page 330.

As your request points out, prior to the 1953 amendment, Section 301 (2) A (3), supra (Section 2, Act No. 669, supra, as amended by Act No. 932, General and Local Acts 1951, page 1600), after listing exempt haulages of certain commodities, contained the exception that the subsection "shall not be construed to exempt from the provisions of this Act any motor carrier who operates under a certificate or permit granted under the authority of the Alabama Public Service Commission." The import of this exception was clearly that even though a carrier hauled exempt commodities if he had a certificate from the Commission he was thereby subjected to the regulatory provisions relating to motor carriers.

The amendment in Act No. 265, supra, changed this exception to read:

" except that this sub-section shall not be construed to exempt from the provisions of the Mileage Tax Act, Act No. 664, General Acts of Alabama 1939, as amended, any motor carrier who operates under a certificate or permit granted under the authority of the Alabama Public Service Commission. . . ."

The apparent intention of this amendment was to relieve carriers from the general regulatory provisions of the Motor Carrier Act as to exempt haulages, and to require merely that the carrier comply with the relevant mileage tax provisions. The omission of the phrase that the subsection "shall not be construed to exempt from the provisions of this Act" can be given no other reasonable significance.

The foregoing would seem to answer both questions which you have submitted.

(Of course, this opinion does not concern nonexempt haulages.)

Very truly yours,

SI GARRETT
Attorney General

February 26, 1954

Hon. W. J. Terry
State Superintendent of Education
C A P I T O L

Schools—County Boards of Education—City Boards of Edu-

cation—State Board of Education—Appropriations—Funds.

1. Minimum Program Funds cannot be used for the support of special classes established in privately-owned or operated schools or institutions for the schooling and training of handicapped children under the provisions of Act No. 636, General and Local Acts 1951, page 1091, or Act No. 652, General and Local Acts 1953, page 912, unless such classes are in fact a part of the public school system and are under the direct jurisdiction and control of local boards of education.
2. The Crippled Children's Service must determine the eligibility of a "handicapped child" for schooling and training in special classes for handicapped children established by local boards of education under the provisions of Act No. 636, *supra*.
3. Regional, area, or district schools for the schooling and training of handicapped children may be established, operated, and maintained jointly by the State Board of Education and the several local boards of education, under the provisions of Act No. 652, *supra*.
4. The State Board of Education is the contracting agency in dealing with privately owned or operated schools or institutions for the schooling and training of handicapped children, under the provisions of Act No. 652, *supra*.
5. The appropriation of \$50,000 made by Act No. 652, *supra*, for the schooling and training of handicapped children may be spent in special classes for handicapped children established in the public school system by local boards of education, or in regional, area, or district schools established jointly by the State Board of Education and the several local boards of education, or in privately-owned or operated schools for handicapped children under contracts or agreements with the State Board of Education. Such appropriation may be prorated among handicapped children throughout the State, provided they are declared eligible by the Crippled Children's Service, and the phrase, "on the basis of \$500 per pupil per year," as used in Act No. 652, *supra*, fixes a maximum, and is not a requirement that \$500 be spent on each individual child.
6. Funds appropriated by Act No. 652, *supra*, for the schooling and training of handicapped children may be spent only on those children declared eligible for schooling and training by the Crippled Children's Service.
7. Where handicapped children are schooled and trained in special classes within the public school system, a "teacher unit" may be allotted, under the Minimum Program Fund,

in addition to allotments from the \$50,000 appropriated by Act No. 652, supra.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of October 1, 1953, is as follows:

"During the regular session of the Alabama Legislature of 1951, Act No. 636, H. 77, relating to the education of handicapped children providing for the training in public schools, etc., was passed and approved September 4, 1951.

"Your official opinion is requested on the following questions:

"1. Is it legal for the County or City Boards of Education to receive funds from the Minimum Program for the support of such classes, and in turn use such funds to reimburse private schools for classes maintained by such schools for the education of the handicapped child?

"2. Is it legal for the State Board of Education to determine what constitutes a handicapped child as provided for under this Act?

"During the 1953 session of the Alabama Legislature Act No. 652, H. 180, was passed. Section 6 of this Act provides further for the schooling and training of handicapped children, etc.

"Your official opinion is requested on the following questions:

"1. Is the State Board of Education authorized to establish, operate, and maintain, regional, area, or district schools independent of county or city boards of education for handicapped children, or is the State Board of Education authorized to reimburse county and city boards of education for the establishment, operation and maintaining of such schools for the handicapped children?

"2. Is it mandatory for the State Board of Education to work directly with privately owned and operated schools in the carrying out of the educational program of handicapped children or is it permissible that in working with privately owned and operated schools that the State Board of Education work through either the City or County Boards of Education in accomplishing such?

"3. Does the State Board of Education have authority to prorate the appropriation under Section 3 of \$50,000 to all handicapped children throughout the State who are attending special classes for handicapped children, or is it mandatory that the State Board of

Education expend \$500 per individual until the \$50,000 is exhausted?

"4. Is it legal for the State Board of Education to expend funds provided in this Act on crippled children other than those defined as handicapped under rules and regulations of the State Board of Education?

"5. Does the State Board of Education have authority to allot a teacher unit in addition to the \$500 provided for each individual under this act?"

You have asked some questions regarding Act No. 636, General and Local Acts 1951, page 1091, and other questions regarding Act No. 652, General and Local Acts 1953, page 912. For the reason that both acts are still in effect, I have considered the provisions of both acts in answering each of your questions.

1. In my opinion, your first question (Question No. 1, Group 1) must be answered in the negative.

Title 52, Sections 208-215, Code of Alabama 1940, cover the establishment, the purposes and plan of apportionment, and other details of the financial structure of the Minimum Program Fund. Section 208, *supra*, establishes the fund for the equalization of educational opportunity in the "public elementary and high schools of the state." Because use of the fund is confined to public school purposes, it is my opinion that it cannot be used to reimburse private schools for classes maintained by such private schools for the training and education of handicapped children. While the receipts from the Minimum Program Fund can be used by local boards of education for the purpose of educating handicapped children, it can be used only in the public schools.

I am informed by you that there are now in operation within the state certain private incorporated schools for handicapped children, which schools are operating special classes for such children with funds from the Minimum Program Fund, and that such classes have been taken into the public school system and are under the direct jurisdiction and control of local boards of education. Where such special classes are a part of the public school system, even though located within private institutions, it is my opinion that Minimum Program Funds can legally be used for the support of such classes. In such cases the local boards of education may receive and spend Minimum Program funds for the support of such classes in the same manner as if said classes were conducted in public school buildings.

2. Your second question in Group 1 and your fourth question in Group 2 are considered together.

Both the 1951 and 1953 Acts, *supra*, require the Alabama State Crippled Children's Service to first approve or declare eligible those handicapped children who are to receive schooling and training under

the provisions of either Act. Of course, this agency, the Alabama State Crippled Children's Service, is an agency of the State Board of Education. See Title 49, Section 101, et seq., Code of Alabama 1940, as amended by Act No. 186, General and Local Acts of 1949, page 218. Therefore, you are advised that it is legal for the agency of the State Board of Education, the Alabama State Crippled Children's Service, not only to determine what constitutes a handicapped child but to approve or disapprove each handicapped child for schooling and training provided for in both the 1951 and the 1953 Acts, *supra*.

The present definition of a handicapped child, as shown by "**Policies and Regulations for the Administration of Act No. 636, Regular Session 1951,**" is as follows:

"Handicapped child, or children, shall mean those children whose physical handicap is so severe that it prevents attendance in regular public school classes."

As stated above, the Crippled Children's Service must approve or declare eligible handicapped children before such children receive schooling and training under the provisions of the 1951 or 1953 Act, *supra*. The State Board of Education, acting through its agency, the Alabama State Crippled Children's Service, has defined a handicapped child as above-quoted. This definition, of course, is within the authority of the Crippled Children's Service, acting for the State Board of Education. The above definition was also apparently made for the purpose of defining a group of handicapped children eligible for schooling and training provided for in the 1951 Act, and now the 1953 Act, *supra*. Such definition is a guide for the said Crippled Children's Service to follow in approving or disapproving handicapped children eligible for schooling and training under the provisions of either Act. The definition of handicapped child may be changed, broadened, or restricted from time to time. It is necessary, however, that each child receiving schooling and training under the 1951 or 1953 Act, *supra*, be approved by the said Crippled Children's Service pursuant to that agency's current definition of a handicapped child.

3. In my opinion, your third question (Question No. 1, Group 2) must be answered by stating that the 1953 Act, *supra*, contemplates a cooperative program between the State Board of Education and the several local boards of education in the establishment and maintenance of regional, area, or district schools for the schooling and training of handicapped children.

Section 1 of Act No. 652, *supra*, provides that:

"The State Board of Education and the several local boards of education may establish, operate, and maintain regional, area, or district schools within the public school system for the schooling

and training of handicapped children. Such schools shall be operated on a day-school and school-year (nine months) basis only, and shall provide occupational therapy, daily physical therapy, speech therapy, psychological care, and academic training for pupils attending the same."

Therefore, it is my opinion that Section 1, *supra*, contemplates that such regional, area, or district schools shall be established and maintained by the State Board of Education and the several local boards of education in cooperation with each other. Neither would have the authority to establish and maintain such schools without the active cooperation and participation of the other. Furthermore, it is my opinion that the State Board of Education and a single county could not establish and maintain such a school, because the term, "regional, area, or district," signifies the cooperation of at least two or more counties.

4. In my opinion, your fourth question (Question No. 2, Group 2) must be answered by stating that, while both the 1951 and 1953 Acts, *supra*, make the State Board of Education the contracting agency, it may for administrative purposes work through local boards of education.

Section 2 of Act No 652, *supra*, provides that:

"The State Board of Education is authorized to make contracts and enter into agreements with established privately-owned or operated schools for handicapped children, and to lease their property and operate such schools as a part of the public school system; provided, that any agreement so made shall be made terminable at the end of any school year upon prior written notice by either party to the agreement; and provided further, that the teachers and other employees of any such school shall be continued in their respective positions until the expiration of their contracts, if such persons have met the standards required by the rules and regulations of the State Board of Education adopted pursuant to Act No. 636, H. 77, approved September 4, 1951."

Therefore, the State Board of Education is designated as the contracting agency, and such contracts should be made in the name of the State Board of Education. For administrative purposes, the State Board of Education could work through the local boards of education if it so desires.

5. In my opinion, your fifth question (Question No. 3, Group 2) must be answered as follows:

Act No. 636, *supra*, authorizes the establishment, by local boards of education, of special classes for handicapped children within the public school system. Act No. 652, *supra*, authorizes the establishment, by local boards of education and the State Board of Education, joint-

ly, of regional, area, or district schools for handicapped children, and further authorizes the State Board of Education to contract with established privately-owned or operated schools for the schooling and training of handicapped children. Of course, such private schools may be operated by the State Board as part of the public school system. The 1953 Act expressly provides that it is supplemental to the 1951 Act.

The \$50,000 appropriation made by the 1953 Act was made to the State Board of Education "for the purpose of contracting for or defraying the expenses of schooling and training handicapped children . . ." In my opinion, all handicapped children declared eligible or approved by the Crippled Children's Service for schooling and training, whether said children are in special classes (including public school classes located in private schools) established by local boards of education, or in regional, area, or district schools established by the State Board of Education and local boards of education, jointly, or in established privately-owned or operated schools for handicapped children under contracts or agreements with the State Board of Education, are entitled to have expended for said schooling and training an amount not to exceed \$500 per pupil per year. That is to say, expenditure of the \$50,000 appropriation made by the 1953 Act, *supra*, is not limited to the methods of schooling and training provided by the 1953 Act, but includes also the method for which provision is made by the 1951 Act.

Moreover, the phrase, "on the basis of \$500 per pupil per year," does not require that the full amount of \$500 be spent on each individual child, or that the entire \$50,000 be spent on one hundred handicapped children selected to the exclusion of other handicapped children. That phrase merely fixes a maximum expenditure on each child.

6. Your sixth question (Question No. 4, Group 2) has been answered above in my answer to your second question.

7. In answer to your seventh question (Question No. 5, Group 2), it is my opinion that the appropriation made by the 1953 Act is an extra or additional source of funds for the schooling and training of handicapped children, over and above such monies as may already be available for that purpose from other sources. For example, where handicapped children are being schooled and trained in special classes established by local boards of education in the public school system, including public school classes located in public schools, the \$50,000 appropriation made by the 1953 Act, *supra*, is available for such schooling and training, and, in addition thereto, a "teacher unit" should be allotted in calculating the amount to be received from the Minimum Program Fund. "Teacher units" could not be allotted to private schools or institutions under contracts with the State Board, because such schools or institutions cannot participate in the Minimum Program Fund, unless said schools or institutions or special classes therein become part of the pub-

lic school system. See Section 2 of Act No. 652, supra.

Very truly yours,

SI GARRETT
Attorney General

March 3, 1954

Hon. J. T. Thrower, Mayor
City of Dothan
Houston County
Dothan, Alabama

Elections — Voting Machines — Compensation — Opinions
Overruled, Modified or Distinguished.

1. Election officials in counties or municipalities wherein elections are conducted in whole or in part by voting machines are entitled to receive eight dollars per day (five dollars per day under the provisions of Title 17, Section 198, Code of Alabama 1940, as amended by Act No. 127, General Acts 1947, page 38, and three dollars per day under Act No. 240, General Acts of 1945, page 359, amending Act No. 409, General Acts 1943, page 375).

2. Part one of the opinion appearing in Quarterly Report of Attorney General, Vol. 66, page 90, is reaffirmed; and the opinion appearing in Quarterly Report of Attorney General, Vol. 50, page 50, is overruled.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of February 19, 1954, is as follows:

"An opinion on January 13, 1948, in Volume 50, page 50 of Quarterly Reports of the Attorney General thru March 31, 1948, holds that election officials in cities and counties where voting machines are used in whole or in part should be paid \$5.00 for their service.

"An opinion on March 13, 1952, in Volume 66, page 90 of the Quarterly Reports thru March 31, 1952, holds that they should be paid \$8.00 per day for their service.

"Each opinion support its conclusion in detail. Would you recon-

cile this apparent conflict and advise us in order that we may pay the correct amount to the officials for their service in the City of Dothan Primary on March 2, 1954.

It is my opinion, after reconsidering both of the opinions referred to in your inquiry, that the one rendered under date of March 13, 1952, and found in Quarterly Report of Attorney General, Vol. 66, page 90, in holding that election officials in counties wherein elections are conducted in whole or in part by voting machines are entitled to receive eight dollars per day, is correct and should be followed. It is hereby reaffirmed.

It appears to me that Act No. 240, General Acts 1945, page 359, amending Act No. 409, General Acts 1943, page 375, allowing election officials in counties and municipalities in which elections are conducted in whole or in part by voting machines the amount of three dollars in addition to the compensation received by election officials in general, was intended by the Legislature to grant extra or additional compensation to those officials serving in counties or municipalities where voting machines are used. It is my opinion that, even though the compensation of election officials in general was raised to the amount of five dollars per day by Act No. 127, General Acts 1947, page 38, amending Title 17, Section 198, Code of Alabama 1940, Act No. 240, *supra*, requires the additional amount of three dollars to be paid to those election officials in counties and municipalities wherein elections are conducted in whole or in part by voting machines.

Therefore, the total amount to be received by such officials is eight dollars per day.

The opinion of this office rendered under date of January 13, 1948, and found in Quarterly Report of Attorney General, Vol. 50, page 50, is, therefore, overruled.

Yours very truly,

SI GARRETT
Attorney General

March 4, 1954

Hon. L. Q. Box
Judge of Probate
Blount County
Oneonta, Alabama

Elections.

Where both a Democratic and Republican primary election

are to be held in a county on May 4, 1954, two sets of election officials must be appointed, one for the Democratic primary election and the other for the Republican primary election.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of February 22, 1954, is as follows:

"The Republican Party in Blount County is going to hold a primary election this spring.

"Will we have to appoint a full set of Election Officers for each party? In over half the precincts in the County the Republicans won't have anyone to hold the election.

"I understand that if they don't have over one candidate to qualify for each office it won't be necessary for them to hold primary?

"Would appreciate your ruling as soon as possible so I can get our election supplies after March 1st."

The judge of probate, sheriff, and clerk of the circuit court, or a majority of them, act as an appointing board for the appointment of election officials for general elections, Title 17, Section 120, Code of Alabama 1940. If any one or more of them are candidates, then he or they cannot serve on the appointing board under the provisions of Title 17, section 122, Code of Alabama 1940. In such case, the person to take the place of the judge of probate, sheriff, or clerk, as the case may be, is selected in accordance with the provisions of Title 17, Sections 123 and 124, Code of Alabama 1940.

While the above provisions apply to general elections, this office has held that they apply equally as well to primary elections. Biennial Report of Attorney General, 1920-1922, page 435; Quarterly Report of Attorney General, Vol. 18, page 177.

The appointing board appoints the election officials in accordance with the provisions of Title 17, Section 349, Code of Alabama 1940, which provides as follows:

"§ 349. Election officers named; oath of.—Each candidate for nomination may at least twenty-five days before the primary, present to the county executive committee of his party a list of election officers desired by him for any one or more of the districts, wards or

precincts; and his county committee shall, so far as practicable, make up, from the list so presented to it, a list of names of election officers, six in number, for each district, ward or precinct, which it will nominate to the appointing board of the county for appointment as officers to conduct the primary election and the county committee shall present the list so made up by it to the appointing board of the county, which appoints the election officers to conduct elections for state and county officers in November, or at any other lawful time, which appointing board from the list so presented to it by the county committee shall if there be on said list the names of sufficient persons who are legally eligible select and appoint the officers to conduct the primary election, observing the above rule as to representation wherever more than one party enters the primary and in the latter case if a county committee has not given a sufficient number of names for a box, then the appointing board shall supply the deficiency from electors of that party. In the event the persons selected as officers fail to appear at the polling place by eight o'clock a. m. on the day of the primary election, then their places shall be filled by such of those who have been named by such appointing board, as do appear; and in the event none so named appear by eight o'clock a. m. then the voters present qualified to participate in such primary election may, from among themselves, select officers to conduct such election in such district or precinct, and such substituted persons, shall have the authority to conduct such elections, and to be paid for their services in same manner as if they had been originally appointed. All officers, serving in such primary elections shall take the same oath required to be taken by officers of regular state elections, which oath may be administered by any person authorized by law to administer oaths, or by any one of the inspectors. The officers of all primary elections held under provisions of this chapter shall have the same power and privileges as officers of regular state elections, and shall be subject to the same restrictions, limitations, penalties and conditions."

If the Democrats and Republicans each hold a primary election in Blount County on May 4, 1954, each candidate participating therein has the right to submit to the county executive committee of his party a list of election officials desired by him for any one or more of the districts, wards, or precincts, and from the lists so furnished by the candidates, the county executive committee of the candidates' party makes up a list of the names of the election officials, six in number, for each district, ward, or precinct which it nominates to the appointing board of the county. If this is done, the appointing board will have two lists, one from the County Republican Executive Committee, and the other from the County Democratic Executive Committee. One list will contain the names of those desired by the Democratic candidates as election officers to hold their primary election, the other the names of those desired by the Republican candidates as election officers to hold their primary election.

Section 349, *supra*, then provides:

" . . . which appointing board from the list so presented to it by the county committee shall if there be on said list the names of sufficient persons who are legally eligible select and appoint the officers to conduct the primary election, **observing the above rule as to representation wherever more than one party enters the primary and in the latter case if a county committee has not given a sufficient number of names for a box, then the appointing board shall supply the deficiency from electors of that party**" (Italics supplied.)

The appointing board, if it does not have a sufficient number of names on the list furnished by the county executive committee, supplies the deficiency from "electors of that party." This clearly shows that two sets of election officials are contemplated where two primary elections are being held on the same day, for this must be in order for the appointing board to supply the deficiency from the "electors of that party."

Then again, the appointing board is required by the provisions of Section 349, *supra*, to appoint the election officers from the list presented by the county committee if it contains the names of sufficient persons who are legally eligible.

If the appointing board appoints only one set of election officials, selecting their names from the lists furnished by both the County Republican Executive Committee and the County Democratic Executive Committee, then it is not appointing the election officials from the **list** furnished by the **Committee** as required by Section 349, *supra*, but is appointing from the **lists** furnished by the **committees**.

It must be kept in mind that two separate and different primary elections are to be held on May 4, 1954, and the fact that they will be held on the same day does not mean that they should be treated as one election.

If only one set of election officials is appointed to hold both primary elections, it could result in the appointment of some who were not suggested by the Democratic candidates, and others who were not suggested by the Republican candidates. This result would, in my opinion, be contrary to the intent of the provisions of Section 349, *supra*, which allow the candidates of each party to have a voice, insofar as possible, in the selection of **all** the election officials who will conduct the primary election for their political party.

It is clear to me that the only way for the appointing board to comply with the provisions of Section 349, *supra*, is by appointing, wherever possible, six election officers from the list furnished by the

County Republican Executive Committee to conduct the Republican primary election, and six election officers from the list furnished by the County Democratic Executive Committee to conduct the Democratic primary election.

While not directly passing upon the question here presented, but persuasive as to the correctness of the view expressed in this opinion, this office has heretofore stated, with reference to a Democratic primary election and a Republican primary election held on the same day, that two separate lists of qualified electors should be furnished, one to the election inspectors (officers) holding the election for the Democratic primary, and one to the election inspectors (officers) holding the election for the Republican primary. Quarterly Report of Attorney General, Vol. 66, page 88.

It is my opinion, therefore, that two sets of election officials must be appointed for the May 4, 1954, primary in Blount County, one for the Democratic primary election, and the other for the Republican primary election.

If a county committee has not given a sufficient number of names for a box and the appointing board cannot supply the deficiency from electors of that party, then the deficiency may be supplied by the appointing board from any available qualified electors of that voting place.

In answer to the other part of your inquiry, your attention is called to an opinion of this office reported in Quarterly Report of Attorney General, Vol. 50, page 188, wherein it was held that where a political party has legally called a primary election and only one person qualifies for each office to be filled in said primary election, such person's name shall not be printed on the ballot, and it is not necessary that any primary election for that party be held.

Yours very truly

SI GARRETT
Attorney General.

March 5, 1954

Hon. L. B. Stephens
Executive Director
Board of Pardons & Paroles
C A P I T O L

Convicts—Pardon, Parole and Probation—Prisons and
Prisoners—Sentences.

The time spent on parole can be considered as time served toward the one-third or ten years of sentence necessary for parole as required by Section 8 of Title 42, Code of Alabama 1940, as amended by Act. No. 599, General and Local Acts 1951, page 1030.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion, bearing date of January 22, 1954, is as follows:

"The Board has asked that I request your official opinion regarding the interpretation of a part of Section 8, Title 42, Code of Alabama, 1940, as amended, (Pocket Supplement.) The part of section 8, supra, which the Board wishes you to officially interpret is as follows:

"... The board shall not grant a parole to any prisoner who has not served at least one-third or ten years of his sentence, whichever is the lessor, except by a unanimous affirmative vote of the board."

"There are prisoners who were paroled prior to the amendment of Section 8, supra, in 1951 who have been returned to prison as parole violators and who are now being reconsidered for parole. The Board would like to know whether or not the time spent on parole can be considered as time served toward the one-third or ten years of his sentence or whether for the purpose of this section only time actually served inside prison walls can be counted toward eligibility."

In **Pinkerton v. State**, 29 Ala. App. 472, 198 So. 157, cert. den. 240 Ala. 123, 198 So. 162, the Court of Appeals of Alabama discussed the effect of a parole on the time required in serving a sentence. In that case, speaking of parole, the court said:

"... while this was an amelioration of punishment it was, nonetheless, punishment and imprisonment in legal effect."
The court also stated:

"... a convict, while on parole, 'outside of prison walls,' is executing his sentence, just as if he were inside of prison walls—'until the expiration of the maximum term specified in his sentence.' (or, of course, unless there should be prior revocation of said parole or unless sooner pardoned)."

The Legislature is presumed to have had notice of the **Pinkerton** case, supra, when Section 8 was amended by Act No. 599, infra.

Section 8 of Title 42, Code of Alabama 1940, as amended by Act No. 599, General and Local Acts 1951, page 1030 provides in part as follows:

"The board shall not grant a parole to any prisoner who has not served at least one-third or ten years of his sentence, whichever is the lesser, except by a unanimous affirmative vote of the board."

Nowhere in Act No. 599, *supra*, is there express requirement that "one-third or ten years" of the sentence be served within the walls.

It is, therefore, my opinion that the time spent on parole can be considered as time served toward the one-third or ten years of sentence necessary for parole without a unanimous vote of the Board of Pardons and Paroles.

In Quarterly Report of Attorney General, Vol. 32, page 64, this office held that a prisoner on parole was not entitled to a good conduct deduction from his sentence for the time spent on parole. That opinion was based, of course, on Act No. 534, General Acts 1943, page 508, which provided in part that, "Each prisoner who . . . is confined . . . in the penitentiary, or at hard labor for the county . . . shall be entitled to a deduction . . ." Therefore, in my judgment, the present opinion is not in conflict with the earlier one found in Vol. 32, *supra*.

Very truly yours,

SI GARRETT
Attorney General

March 10, 1954

Hon. J. W. Hamilton
Tax Collector
Jefferson County
103 Court House
Birmingham 3, Alabama

Tax Collectors—Tax Sales—Publications—Newspapers.

1. The rate to be paid for the publication of notices of tax sales by the tax collector provided for in Title 51, Section 259, Code of Alabama 1940, is now governed by the provisions of Act No. 793, General and Local Acts 1953, page 1086.

2. Under Act No. 793, *supra*, the current published commercial rate may be contracted for when publication is made in a daily newspaper.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of February 25, 1954, is as follows:

"Please give me your opinion as to whether or not Act 793, Page 1086, Volume 2 of the regular Session of 1953 Legislature repeals and supercedes Section 259, Title 51 of the Revenue Code of Alabama.

"If your opinion is in the affirmative and if the local Daily Newspaper refuses to print my tax ad at the rate prescribed in said Act No. 793, would I be authorized to contract with said papers to carry said ad at the current published commercial rate.

"I would appreciate an early opinion, as I am preparing to print my sales docket sheets and other items pertinent to the sale, and it is necessary that I know just what rate to charge for my tax ad."

In answer to your first inquiry, it is my opinion that the rate to be paid for the publication of notices of tax sales by the tax collector provided for in Title 51, Section 259, Code of Alabama 1940, is now governed by the provisions of Act No. 793, General and Local Acts 1953, page 1086.

This inquiry involves the question of whether the rates provided for official publications in general under Act No. 793, supra, are applicable to all official publications except those specifically excepted thereunder. Said Act clearly evinced a legislative intent that it is all inclusive, with the exception of local acts prescribing different rates, and established a uniform system throughout the State.—Opinion to Hon. James F. Hester, Judge of Probate, Franklin County, under date of February 2, 1954.

I am of the opinion that your second inquiry should be answered in the affirmative. Your attention is specifically invited to that portion of Section 2 of Act No. 793, supra, "provided that the current published commercial rate may be contracted for when the publication is made in a daily newspaper."

Very truly yours,

SI GARRETT
Attorney General

March 12, 1954

Hon. John Brandon, Chairman
Board of Adjustment
State of Alabama
C A P I T O L

Taxation—Insurance—Claims—Opinions Overruled, Modified, or Distinguished.

1. State Board of Adjustment has authority to refund taxes on insurance premiums erroneously paid.
2. Quarterly Report of Attorney General, Vol. 35, p. 77, overruled.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of March 9, 1954, is as follows:

"The Washington National Insurance Company has recently filed a claim before the State Board of Adjustment seeking a refund of premium taxes in the amount of \$2,126.71 erroneously paid to the Superintendent of Insurance who, in turn, paid them into the State Treasury. The Superintendent of Insurance admits the company has overpaid its premium taxes in the amount claimed.

"An opinion of your office, addressed to Hon. Frank N. Julian, Superintendent of Insurance, Department of Commerce, State Capitol, under date of January 27, 1940, and reported in Quarterly Report of Attorney General, Vol. 18, page 118, held there was no authority of law to refund taxes on insurance premiums erroneously paid to the Superintendent of Insurance, except by timely petition to the State Board of Adjustment.

"A subsequent opinion of your office, addressed to Hon. Hayse Tucker, Chairman, State Board of Adjustment, Department of Finance, under date of June 12, 1944, and found in Quarterly Report of Attorney General, Volume 35, page 77, advised that the State Board of Adjustment had no jurisdiction to award an insurance company monies which it overpaid by an erroneously drawn check to the Superintendent of Insurance in remitting premium taxes, since the amount overpaid into the treasury must be returned under the provisions of Title 55, Section 338, Code of Alabama 1940, to such officer who is liable in a court action to the insurance company. "This is to request your official opinion as to whether or not the State Board of Adjustment has authority to refund the premium

taxes above mentioned to the Washington National Insurance Company."

In answer to your inquiry, I am of the opinion that the statute creating the State Board of Adjustment confers jurisdiction on this Board to consider the claim mentioned in your inquiry and that the Board may, after determining the facts in the case, make an award for the refund of taxes on insurance premiums erroneously paid to the Superintendent of Insurance.

Title 55, Section 334, Code of Alabama 1940, provides that the Board of Adjustment shall have the power and jurisdiction and it shall be its duty to hear and consider "all claims for money overpaid on obligations to the State of Alabama, or any of its agencies, commissions, boards, institutions, or departments; also, all claims for money voluntarily paid to the State of Alabama, or any of its agencies, commissions, boards, institutions, or departments; also, all claims for money voluntarily paid to the State of Alabama, or any of its agencies, commissions, boards, institutions or departments, where no legal liability existed to make such payment."

Section 334, supra, further states that this Board shall not exercise jurisdiction over claims of which the courts of this State have or had jurisdiction. It is well settled, if such taxpayer has a legal remedy provided by the Legislature to obtain a refund of taxes erroneously paid, that this Board is without jurisdiction to award the overpayment.

I find no provision of law permitting a refund of such a tax by the Insurance Department. The opinion of this office holding otherwise, reported in Quarterly Report of Attorney General, Vol. 35, p. 77, is, therefore, expressly overruled. In arriving at this conclusion, careful consideration has been given Title 51, Section 328, et seq., Code of Alabama 1940, particularly Section 338.

As stated in the case of **Lee, State Comptroller v. Cunningham**, 234 Ala. 639, 176 So. 477: "It is well settled that the right to reclaim money voluntarily paid to the state or the counties thereof, as taxes, is a creature of legislative grace which the legislature may restrict or limit by future legislation. *First National Bank of Scottsboro v. Jackson County*, 227 Ala. 448, 150 So. 690."

It is, therefore, my opinion that the Board of Adjustment has jurisdiction over the specific claim here in question. See Quarterly Report of Attorney General, Vol. 18, p. 118.

Very truly yours,

SI GARRETT
Attorney General

March 15, 1954

Hon. G. H. Forrester
Supervisor, Bureau of Loans
Department of Commerce
C A P I T O L

Banks and Banking—Loans—Records—Department of Commerce.

A note executed by a borrower in connection with a loan made in accordance with the provisions of Act No. 787, General and Local Acts 1951, page 1385, is not classified as a part of the books and records of the licensee, as required by Section 7 of the Act, and the form thereof cannot be prescribed by the Bureau of Loans.

Opinion by Assistant Attorney General Grant.

Dear Sir:

Your request for an official opinion, bearing date of January 11, 1954, is as follows:

"On the examination of all licensees under Act No. 787, General and Local Acts 1951, page 1385, it has been found that all of the licensees charge in excess of eight per cent interest. The question submitted will be of such nature that it is taken for granted that an excess of eight per cent interest has been charged.

"Section 8 (a) of Act No. 787, supra, reads as follows:

" 'Each loan made by any licensee must be evidenced by a note, mortgage or conditional sale contract.'

"Section 7 of Act No. 787, supra, reads as follows:

" 'Each licensee shall keep such books and records in his place of business as in the opinion of the Supervisor of the Bureau of Loans will enable the Supervisor or any employee of said Bureau to determine whether the provisions of this Act are being observed. Every such licensee shall preserve the records of final entry used in such business, including cards used in the card system, if any, and carbon copies of all receipts issued by such licensee for a period of at least two years after the making of any loan recorded therein. The Supervisor, with the approval of the Director of the Department of Commerce is hereby empowered to prescribe rules and regulations governing the books and records to be kept and the

form thereof to aid the Bureau in the enforcement of this Act and the forms of receipts and memoranda to be furnished customers as prescribed in Section 10 hereof. Such rules when promulgated, shall have force and effect as law sixty days thereafter.'

"A portion of Section 11 (a) reads as follows:

" ' . . . If it be made to appear that the provisions of this Act have been violated or that interest in excess of eight percent (8%) per annum has been charged, then judgment shall be rendered in favor of the plaintiff for the principal balance only of the indebtedness sued upon without an Attorney's fee '

"Will you please advise as to the following questions:

"1. Is a note taken in connection with a loan made by a licensee under Act No. 787, supra, classified as a part of the books and records as set out in Section 7 of Act No. 787?

"2. If a note is classified as a part of the books and records as set out in Section 7 of Act No. 787, supra, can the Supervisor of the Bureau of Loans prohibit all licensees from the use of notes containing the clause permitting an attorney's fee?"

I am of the opinion that your first question should be answered in the negative. The promissory note executed by the borrower at the time of the transaction is evidence of his debt; but when he pays the debt the note is returned to him and is no longer a paper record of the loan agency.

The provisions of Section 7, Act No. 787, General and Local Acts 1951, page 1385, require that each licensee keep such books and records in his place of business as will enable the Supervisor of the Bureau of Loans to determine if the provisions of the Act are being complied with. Section 7 is, in pertinent part, as follows:

" . . . Every such licensee shall preserve the records of final entry used in such business, including cards used in the card system, if any, and carbon copies of all receipts issued by such licensee for a period of at least two years after the making of any loan recorded therein. The Supervisor, with the approval of the Director of the Department of Commerce is hereby empowered to prescribe rules and regulations governing the books and records to be kept and the form thereof to aid the Bureau in the enforcement of this Act and the forms of receipts and memoranda to be furnished customers as prescribed in Section 10 hereof. Such rules when promulgated, shall have force and effect as law sixty days thereafter."

The provisions of Section 10 of Act No. 787, supra, require that every licensee shall deliver to the borrower, at the time the loan is made, a carbon copy of the note, contract, mortgage or other evidence of indebtedness which he has executed. Upon payment of the debt, the

licensee shall thereupon mark every paper signed by the borrower with the word "paid" or "cancelled" and return the document to the said borrower. In any event, the note, irrespective of whether it be a "customer's" form of promissory note, or whether it be of some "special" form, is nevertheless marked paid and returned to the customer when the account is settled, and it would not be available to the licensee to constitute a part of his books and records. I am of the opinion that the note is not, therefore, classified as a part of the books and records as contemplated by the provisions of Section 7, supra.

In answer to your second question, it would follow that since a promissory note is not a book or record within the meaning of Section 7, supra, the form thereof, including the provision concerning the attorney's fees, cannot be prescribed by the Bureau of Loans.

Very truly yours,

SI GARRETT
Attorney General

March 29, 1954

Hon. J. M. McCullough, Jr.
Commissioner
Board of Corrections
C A P I T O L

Convicts—Corrections and Institutions, Department of—
Prisons and Prisoners—Sentences—Opinions Overruled,
Modified or Distinguished.

1. A prisoner is entitled to his discharge at the convenience of the discharging authority at sometime during the last day of his sentence.

2. Biennial Reports of Attorney General, 1926-28, page 254, modified.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion, bearing date of March 17, 1954, is as follows:

"Your official opinion is requested on the following matter.

"The question has arisen as to whether we can discharge a prisoner at anytime during the last day of his sentence. Must we make him

serve until mid-night of the last day of his sentence, or may we discharge him at any time during the last day."

Under the provisions of Title 1, Section 2, Code of Alabama 1940, as amended by Act No. 268, General and Local Acts 1951, page 551, the word "month" means a calendar month unless another meaning is apparent from the context in which it is used. In jurisdictions where "month" is thus defined, a person sentenced to imprisonment of a month is entitled to be discharged on the day in the succeeding month immediately preceding the day numerically corresponding to that from which his sentence takes effect. **Birdsall v. Lewis**, 285 N.Y.S. 146.

In the **Birdsall** case, *supra*, it was held that a prisoner sentenced for six months on the 15th day of the month was entitled to his release sometime on the 14th day of the sixth month following.

The Court held in part as follows:

"... and the prisoner is entitled to credit for any day during which he is confined; any attempt to exclude in the computation either the first day or the last day would constitute a false imprisonment. Six months means six months, no more and no less."

It is my opinion, therefore, that a prisoner should be discharged at the convenience of the discharging authority sometime during the last day of his sentence. He should not, of course, be kept past midnight of that day.

In Biennial Report of Attorney General, 1926-28, page 254, this office held that a prisoner's term expired at midnight of the last day of his sentence and that he would be entitled to his release on the morning of the following day. Insofar as that opinion holds that prisoner may be confined after midnight of the last day of his sentence, it is hereby modified to conform to the rule laid down in **Birdsall v. Lewis**, *supra*.

Very truly yours,

SI GARRETT
Attorney General

March 30, 1954

Hon. Hugh Brown, Sr., Chairman,
Alabama State Milk Control Board,
C A P I T O L

Milk Control Board—Licenses.

1. Persons operating milk cooling stations are required to

be licensed by the Milk Control Board as "Distributors" when the milk is sold into an established milk shed.

2. A milk distributing or bottling plant license as "Distributor" covers licensee's cooling station, where operated as an integral part of such business.

3. The license fee for a distributor's license must be paid when license is issued by the Milk Control Board.

Opinion by Assistant Attorney General Miller.

Dear Sir:

A request for an official opinion from your predecessor in office, Mrs. T. L. Bear, Jr., bearing date of November 20, 1953, is as follows:

"Request for opinion of Attorney General.

"The Milk Control Board of the State of Alabama is desirous of securing the opinion of your office regarding its authority under Title 22, Sections 205-231, inclusive, of the Code of Alabama of 1940, with reference to the matters hereinafter set forth.

"Your attention is invited to the following:

" § 206. Definitions.— "Milk dealer" means any person who purchases, buys, sells, handles or produces milk in any way except for consumption where said milk is not to be resold or otherwise distributed. Each person, corporation, partnership or association, which, if a natural person, shall be a milk dealer within the meaning of this chapter, and any subsidiary or affiliate of such corporation similarly engaged shall be deemed a milk dealer within the meaning of this definition. A hotel, lunchstand or restaurant which sells milk intended for consumption only upon the premises where sold; or a wholesale producer who sells his entire production to distributors; or a person who buys milk for processing purposes only and who does not sell or distribute any milk for fluid milk consumption shall not be deemed a milk dealer. "Distributor" means a person who purchases, accepts or receives milk for the purpose of putting such milk in bottles or other unit containers in which same is designed to be sold or for the purpose of cooling, pasteurizing, standardizing or otherwise processing such milk for fluid milk consumption or who buys milk from another producer, producer-distributor or distributor for the purpose of selling, jobbing or distributing such milk at wholesale or retail for any one or more such purposes. Said term, however, excludes all persons hereinafter defined as producer-distributors. "Producer" means a person who produces milk, any part or all of which is sold to another by whatever means or device for use, resale, or for fluid milk consumption.

"Milk shed" means any city, town or village and surrounding territory, or any two or more cities, towns or villages and surrounding territory, which the milk control board may ascertain to constitute a natural marketing area and may designate as a milk shed
"Licensee" means any person who holds a license from the milk control board, whether such person be a producer, producer-distributor, distributor, wholesale producer, store or milk dealer.'

" § 213. Licenses to producers, producer-distributors, milk dealers, stores and distributors.—In any milk shed where the provisions of this chapter once apply, it shall be unlawful for any producer, producer-distributor, store, milk dealer, or distributor to produce, sell, buy, handle, or distribute milk unless such person be duly licensed as provided by this chapter. . . .

" § 214. Application for license.—An applicant for licenses to operate as milk dealer, producer, producer-distributor, store, or distributor shall file an application upon a blank prepared under authority of the board. An applicant shall state such facts concerning his circumstances and the nature of the business to be conducted as in the opinion of the board are necessary for the administration of this chapter. Such application shall be accompanied by the license fee required to be paid. The board may classify licenses and may issue licenses to milk dealers to carry on a certain designated kind of business only, or the same may be limited to a particular city or village or to a particular market or markets in the state, and may specify the place or places where milk may be received from producers by and with the consent of a majority of such producers. . . .

" § 215. License fees.—All persons required by this chapter to be licensed shall pay a yearly license fee computed upon the following rates: . . . '

"(Note: A license schedule is set up for certain groups defined in Section 206, but no license fee is prescribed for 'milk dealer.')

" § 221. Disposition of license fees and fines.—The executive secretary and financial officer shall deposit all monies received by him under the provisions of this chapter with the treasurer, auditing said money through the comptroller's office, as is provided for other funds paid into the treasury, and all such money is hereby appropriated to the milk control board to defray the expenses incurred in carrying out and enforcing the powers and duties granted and imposed by this chapter, which shall be paid out of the treasury upon warrants drawn by the comptroller, upon approval by the financial officer and any one member of the board, '

"ADDITIONAL FACTS

"At the time the Milk Control Law was written, it was customary

for distributors of milk to purchase their milk supply directly from individual producers. The supply of milk so purchased was then taken directly from the producer's farm to the distributor's plant for processing and resale. This resulted in the establishment and operation of dairy farms in close proximity to the location of distributor's plant. With an increase in the sales and consumption of milk, it became necessary for the distributor to move further and further away from the situs of his plant to acquire the necessary supply of milk for his sales. Hence, there has now developed an intermediate operation in the handling of milk which is designated by the industry and commonly known as a 'cooling station.'

"A cooling station is a collection point where the various producers of milk in a particular area assemble their production of milk for subsequent delivery to the distributor's plant. The functions of the cooling station are to receive, weigh, test for butterfat content, cool and store the milk in holding tanks for such subsequent delivery to the distributor's plant.

"At present time there are in Alabama two types of cooling stations operating; namely, (a) cooling stations owned and operated by distributor licensees for their own use and convenience, and (b) cooling stations independently owned and operated by persons having no direct connection with a distributing plant.

"In the first type of operation ('a' above) the distributor deals directly with his producer; all quotas with the distributor are held in the name of the individual producer and the producer in turn receives payment for his milk directly from the distributor.

"In the second type of operation ('b' above) there is no direct relationship between the distributor and the producer. The distributor deals directly with the personnel operating the station and normally is not aware of the identity of the producers shipping to that station. The quotas with the distributor are earned in the name of the cooling station and the distributor pays the cooling station directly for the milk shipped to his plant. The producers shipping to such cooling station in turn earn a quota with the cooling station. This type of station sells milk to various distributors whose plants are located within and without the boundaries of the State of Alabama; hence, the individual producer shipping to such a station has no way to determine which distributor actually receives the milk produced by him. The independent cooling stations have two sources from which they obtain their supply of milk; namely, licensees and non-licensees of the Board. There are presently two independent cooling stations operating in this State. One is operated as a partnership and the other as a corporation. Neither of the independent cooling stations are presently licensees of the Alabama State Milk Control Board. Each of these stations is presently selling and delivering milk into an established milk shed; each of these stations at times

purchase milk from non-licensees of the Board and each, though non-licensees themselves, have been designated by certain producer licensees to act as their agent in handling, placing, and selling milk to distributor licensees of the Board who operate in established milk sheds. In these cases the distributor licensees make remittance for the purchase price of the milk directly to the non-licensee cooling stations who in turn distribute the money so received to the various producer licensees. In such cases, the quotas which actually are owned by the producer licensees of the Board are held in the names of the non-licensee cooling stations as agent for the named licensees.

"In addition, to delivering locally produced milk for licensed producers, these non-licensed cooling stations at times find it necessary or advisable to purchase from or otherwise deliver milk for non-licensees in order to fulfill their commitments to the distributing plant to which they sell milk.

"In view of Title 22, Chapter 7, of the Code of Alabama 1940, and based on the facts above stated, your opinion is respectfully requested concerning the following matters:

"1. Does the Alabama State Milk Control Board have the authority under the Milk Control Act to establish a classification under Section 206 thereof for 'cooling stations'? If your answer is in the affirmative, does the Board have the authority to set up and establish a license fee to be paid to the Milk Control Board by applicants who desire to become licensee cooling stations? If so, what fee schedule may be established?

"2. State what are the regulatory functions of the Board in matters between a non-licensee cooling station in its dealing with a distributor licensee of said Board when such non-licensee is acting as the agent for licensee producers of said Board.

"3. In light of Section 213, is it lawful for any non-licensee in his own right or while acting as agent for licensees to 'produce, sell, buy, handle, or distribute milk' in an established milk shed unless such person shall be first duly licensed by the Alabama State Milk Control Board?

"4. Does the Alabama State Milk Control Board have the authority under the Milk Control Act to classify 'cooling stations' as 'milk dealers'?

"5. In view of Section 213, does the Milk Control Board have the authority to establish the schedule of fees to be paid by persons defined in such Act as 'milk dealers'?

"6. If your answer to question No. 5 is in the affirmative, then what license fee schedule should be established for persons defined as 'milk dealers'?"

"7. Does the Alabama State Milk Control Board under Section 212 or any other section of the Milk Control Act have the authority to audit and demand reports from or otherwise exercise regulatory control over a non-licensee of the Board when such non-licensee has been designated by a licensee as their agent?"

"8. Should you determine that the Alabama State Milk Control Board does not have the authority to license cooling stations, then does the cooling station, although a non-licensee of the Alabama State Milk Control Board, enjoy the provisions of the Milk Control Act in its dealings with the distributor-licensee to the same extent as an individual producer-licensee who deals directly with a distributor-licensee?"

"9. Can a distributor-licensee of the Alabama State Milk Control Board be required to pay an additional fee for operating a cooling station which is owned and operated by the distributor-licensee as an integral part of his distributing operation."

"10. Under the provisions of Title 22, of the Code of Alabama of 1940 with particular reference to Sections 213, 214, 215 and 221, is the collection of a fee a pre-requisite to the issuance of a license?"

To answer your Question No. 1, it is necessary to determine whether persons operating milk cooling stations, as such operation is described in your inquiry, are required to be licensed by the Milk Control Board; and if so, the type of license which is required of such persons.

Chapter 7 (Sections 205-231), Title 22, Code of Alabama 1940, as amended by Acts Nos. 785 and 269, General and Local Acts 1951, pages 1383 and 552, creates the State Milk Control Board and regulates the fluid milk industry in Alabama. Section 213, *supra*, requires that in areas which are subject to the provisions of the milk control law, persons defined as "Producer, Producer-distributor, Store, Milk dealer, or Distributor" must be duly licensed by the Milk Control Board before such persons may produce, sell, buy, handle or distribute milk.

Section 206, *supra*, defines the above mentioned classifications of persons producing or handling milk who are required to have a license from the Milk Control Board. The pertinent provisions of these two sections of the milk control law, as well as other sections thereof, are quoted in your inquiry.

Words, phrases, and terms are frequently defined in statutes, that is to say, the Legislature in enacting a statute may also declare the meaning or construction to be placed on such words, phrases, and terms

and the court is bound by such definition or construction. 82 C. J. S., Statutes, Section 315. The meaning of the words "Producer," "Producer-Distributor," "Milk dealer," and "Distributor," as well as other words defined in this statute, is, therefore, governed by Section 206, supra, and such words, where used in the milk control law, must be given this meaning, unless, as this section also provides, the subject matter or context requires a different meaning.

A review of the various terms which are defined in Section 206, supra, indicates that the activity engaged in by persons handling milk in the operation of a milk cooling station, as such operation is described in your inquiry, would come within the term "Milk dealer" or "Distributor." It is noted that the term "Milk dealer" as defined in this section includes "any person who purchases, buys, sells, handles or produces milk in any way" with certain stated exceptions, none of which are applicable here. It is also noted that the term "Distributor" means a person "who purchases, accepts or receives milk for the purpose of putting such milk in bottles or other unit containers in which same is designed to be sold or for the purpose of **cooling**, pasteurizing, standardizing or otherwise processing such milk for fluid milk consumption or who buys milk from another producer, producer-distributor or distributor for the purpose of selling, jobbing or distributing such milk at wholesale or retail for any one or more such purposes." (Emphasis added.) Although the term "Milk dealer" may generally apply to the activity engaged in by persons who operate cooling stations, it appears that persons who **cool** milk for fluid milk consumption are expressly and specifically declared to be "Distributors" and, therefore, a person who operates a cooling station would come within the definition of "Distributor." Another clause in this definition which states that any person **"who buys milk from another producer, producer-distributor or distributor for the purpose of selling, jobbing or distributing such milk at wholesale or retail for any one or more such purposes"** appears to be applicable to persons operating cooling stations, as you state that such persons purchase milk for resale. (Emphasis added.)

In construing a statute to arrive at its true meaning, the express language used therein should not be ignored, and every word of such statute should be given its literal meaning, unless such meaning would be inconsistent with the purpose of the statute as such purpose is gathered from the entire statute as written. **Southern Industrial Institute vs. Lee**, 234 Ala. 404, 175 So. 365; **Ex Parte Miles**, 248 Ala. 386, 27 So. 2d 777; **Mooring vs. State**, 207 Ala. 34, 91 So. 869. A review of the milk control law in its entirety reveals that to declare that those who operate "cooling stations," as described in your inquiry, as "Distributors," is consistent and in harmony with the purpose of the milk control law.

In view of the foregoing, my answer to your Question No. 1 is that the Milk Control Board has authority to determine the type of license required for cooling stations and should license a cooling station as a "Distributor," which will subject a person operating the station to the license schedule and the fee levied for distributors under the provisions

of Section 215, *supra*. You will notice that this section expressly declares that a distributor is required to pay a yearly license fee which is based upon the volume of milk handled by such distributor. The amount of the license fee should be based upon the total volume of milk handled by such distributor per day, regardless of the source or destination of the milk. Quarterly Report of Attorney General, Vol. 22, page 264. My answer to your Question No. 1 applies to cooling stations described in your inquiry as "cooling stations, independently owned and operated," and in view of my answer to your Question No. 9, hereinafter given, a separate license is not required for persons operating a cooling station in connection with a milk bottling plant, where the plant is licensed as a distributor and said station is, in fact, an integral part of the distributor's business.

In connection with your Question No. 1, it should be added that the Milk Control Board does not have authority to establish classifications apart from those defined in Section 206, *supra*. Those classifications are defined and provided for by statute. As already stated in my opinion, a cooling station performing the acts described in your inquiry should be determined to be a distributor as defined in Section 206, *supra*.

Furthermore, the amount of the license fee is not established by the Milk Control Board, but is prescribed by statute. See Section 215, *supra*. The Board, of course, has authority to reduce the rate of the license fee. It is unnecessary, therefore, to decide what fee schedule may be established by the Board for licensing a cooling station as a distributor. The rate for a distributor's license fee is provided by law. See Section 215, *supra*.

Your Questions No. 2 and No. 3 are related and will be answered together.

From the facts stated in your inquiry, it appears that cooling stations are of two types: (a) Cooling stations owned and operated by distributor licensees for their own use and convenience; and (b) cooling stations independently owned operated by persons having no direct connection with a distributing plant.

In the case of type (b), I am informed that some such cooling stations claim to be agents of licensed producers and, therefore, exempt from licensing requirements. It is my view that a person, or corporation, or partnership operating such a cooling station—that is to say, a person who receives milk from producers, cools the milk, and then sells the milk to distributors in a milk shed—must be licensed as a distributor. If such cooling station is operated as described in your inquiry, it is my view that such station is not an agent of the producer in the sense that such agency would exempt the operator of said cooling station from obtaining a distributor's license. Even though the operator of a cooling station claims to be acting as agent for a producer licensee, but never-

theless cools milk and sells it in a milk shed to a licensed distributor, it is my view that if he is an independent operator, not an integral part of the business conducted by the producer licensee, such cooling station operator must obtain a distributor's license. He may be the agent for the producer insofar as handling the producer's milk is concerned, but said cooling station operator is also performing certain acts for which a license is required. That license I have said to be a distributor's license.

In my opinion, therefore, cooling stations as described in your inquiry (not including those operated as an integral part of a distributor's business) are subject to all regulatory provisions of the milk control law as is any other distributor licensee; furthermore, such cooling stations must obtain proper license before selling, buying, handling or distributing milk in an established milk shed or else said action would be unlawful.

Your Questions No. 4, 5, and 6 are predicated upon the basis that milk cooling stations, as described in your inquiry, may be determined to be "Milk dealers" within the meaning of such term as it is defined in Section 206, *supra*. Since my answer to your Question No. 1 is that such cooling stations are "Distributors" and not "Milk dealers," it is unnecessary to answer these questions.

It is my understanding that the non-licensees referred to in Question No. 7 are the independently owned and operated cooling stations described in your inquiry. In view of my answer to your Question No. 1 that such cooling stations are required to be licensed by the Milk Control Board, it is unnecessary to answer this question as it relates to non-licensees of the Milk Control Board. Your attention is directed to the provisions of Sections 216, 218 and 219, *supra*, concerning the authority of the Milk Control Board to audit and demand reports from licensees of the Board. These sections expressly authorize audits and reports of the business affairs of licensees of the Milk Control Board.

Cooling stations referred to in your Question No. 8, as described in your inquiry, are required to have a license as explained in my answer to Question No. 1; therefore, it is unnecessary to answer your Question No. 8.

It appears that your Question No. 9 refers to the type of cooling station operation described in your inquiry as cooling stations owned and operated by distributor licensees. Inasmuch as your explanation of their method of operation and your question expressly states that these cooling stations are "an integral part of his distributing operation," it is my opinion that an additional license fee for such a cooling station is not required to be paid as the license issued to the distributor covers the cooling station. The case of **Hill Grocery Company vs. State**, 26 Ala.

App. 302, 159 So. 269, contains the following rule:

“ . . . when a license to do a general business has been exacted and such license paid another license cannot be required and collected for the doing of a part of the particular act, **or series of acts constituting an integral part of such business.** . . . a person who has taken out a license for, or paid a tax on, a certain business cannot be compelled to take out another license or pay another tax for anything which constitutes an essential part of such business.” (Emphasis added.)

The above pronouncement by the court is applicable to your Question No. 9; and, as stated, it is my opinion that a distributor who operates a cooling station as an integral part of his operation is not required to pay an additional license fee for operating the cooling station.

In answer to your Question No. 10, you are advised that you should collect the license fee before a license is issued to the person required to be licensed by the Milk Control Board as a distributor.

In 53 C. J. S., Licenses, Section 51, the following statement appears concerning the time of payment of licenses:

“The time and manner of payment of a license fee or tax are generally governed by the provisions of the statute or ordinance requiring the license or tax, since they are generally payable annually or monthly. . . .

“It is not essential that a license or privilege tax be paid before the exercise of the license or privilege, but payment may precede or follow the exercise of the privilege depending on which system the legislature chooses to adopt. . . .” (Emphasis added.)

The above stated rule is applicable, and it declares that the time of payment of a license fee is governed entirely by the statute which levies the license. Section 214, *supra*, expressly requires that applications for a license filed with the Milk Control Board “shall be accompanied by the license fee required to be paid.” Therefore, it is my opinion that the payment of the license fee is a condition precedent to the issuance of a license.

Yours very truly,

SI GARRETT,
Attorney General

March 30, 1954

Hon. Sim L. Howell, Chairman
Board of Revenue and Control
Morgan County
Decatur, Alabama

Elections—Poll Tax and Poll Lists.

1. The judge of probate is required to furnish a list of qualified electors for each voting place to the election inspectors, and is authorized to employ assistants and clerical help in preparing this list.
2. The compensation of such assistants and clerical help is paid out of the county treasury.
3. The lists of qualified electors which are furnished to election inspectors may be printed, but such lists are not required to be published in a newspaper.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion bearing date of February 22, 1954, is as follows:

"By reason of the provisions of 1947 Acts, Page 505, providing that the election voting places shall not be changed within three months before an election is to be held, we are confronted in this county with a very difficult situation. I assume this will also be true in many of the other counties. We have a great many new registered voters and many of our present existing boxes will have too many voters. Until the discovery of this act it had been the intention of the Probate Office and this office to rebox the county before the primary election.

"The Probate Office has now suggested that in printing the poll list that only sufficient number of the list be printed for use in the two primary elections and a special election which we have on March 30th and that after the primaries the re-boxing be done and then a sufficient number of additional lists be published to cover all other elections which may be held between now and 1956.

"This will cause additional costs in printing poll lists and I would like an official opinion as to whether I would be authorized to make the additional expenditure for the sake of convenience in other elections which will undoubtedly take place over the course of the next two years.

"An immediate reply to this letter is needed as we have a special hospital tax election on March 30th and the Probate Office has agreed to get the poll list published before the middle of March for use in this election."

By virtue of Act No. 655, General Acts 1947, page 504, the judge of probate is required to furnish the election inspectors at each voting place in each election one list of qualified electors for such voting place.

Also see Act No. 482, General Acts 1947, page 331, amending Title 17, Sections 38 and 40, Code of Alabama 1940; and Quarterly Report of Attorney General, Vol. 26, page 146.

Title 17, Section 55, Code of Alabama 1940, as amended by Act No. 385, General and Local Acts 1951, page 677, reads, in part, as follows:

"Section 55. (402) CLERICAL ASSISTANTS TO MAKE INSPECTORS' LIST.—The judge of probate may employ such assistants and clerical help as may be necessary to complete and properly prepare the list of qualified electors which the judge of probate is required to furnish the election inspectors. Such assistants shall be paid out of the county treasury by warrants, drawn by the commissioners court, board of revenue, or other governing body, on certificate of the probate judge, accompanied by the certificates of the person being paid, showing the amount is due under the provisions of this article; but the entire amount spent for such assistants and clerical help shall not exceed a sum equal to the amount obtained by multiplying the number of names on said list by five cents. . . ."

This statute authorizes the judge of probate to employ such assistants and clerical help as may be necessary to complete and properly prepare the lists of qualified electors which he is required to furnish the election inspectors in each election. Quarterly Report of Attorney General, Vol. 48, page 110. The fixing of the amount of compensation for such help is left with the judge of probate; however, the amount of such compensation may not exceed the maximum amount provided by Act No. 385, *supra*. **Aldredge v. Bailey**, 29 Ala. App. 44, 191 So. 647. The compensation of such assistants and clerical help is to be paid out of the county treasury. Quarterly Report of Attorney General, Vol. 25, page 180.

It is my opinion that the judge of probate may have the lists of qualified electors, here under consideration, printed if the cost of completing and preparing said lists, including printing, does not exceed the maximum amount provided by Act No. 385, *supra*.

The premises considered, it is my opinion that the county, before any election, may pay those employed by the judge of probate to properly complete and prepare the lists of qualified electors which he is required to furnish election inspectors in each election so long as the total expenditure made by the county for the preparation of said lists, including the printing thereof, does not exceed an amount obtained by multiplying the number of names on said lists by five cents.

It should be pointed out that it is not required that the lists, here under consideration, be published in a newspaper. Biennial Report of Attorney General 1926-28, page 147; Vol. 48, page 110, *supra*. Newspaper publication of the list of qualified electors is required to be made only

at the time prescribed by Section 38, as amended, supra. The number of necessary copies of said newspaper lists needed by the probate judge may be determined by him. If the probate judge is of the view that the list published in the newspaper will be revised in a short time he may order fewer copies of said newspaper lists. However, when the new list is made, after subdividing election precincts or districts, the list to be furnished election inspectors need not be published in a newspaper, but may be typed or printed for distribution before the next election.

Yours very truly,

SI GARRETT,
Attorney General

March 31, 1954

Mrs. Agnes Baggett
Secretary of State
State of Alabama
C A P I T O L

Advertisements and Advertising—Corrupt Practice Act—
Elections—Radios.

1. Expenses for newspaper, radio, and television advertising should not be included in the total amount of campaign expenditures permitted under Title 17, Section 272, Code of Alabama 1940, as amended by Act No. 592, General and Local Acts 1951, page 1024.

2. The term "radio advertising" is sufficiently comprehensive to include television advertising under Corrupt Practice Act.

Opinion by Assistant Attorney General Smith.

Dear Madam:

Your request for an official opinion bearing date of March 18, 1954, is as follows:

"I have received a number of inquiries from candidates for the coming Primary Election as to whether or not the term 'radio advertising' used in Act No. 592 of the 1951 Session also includes 'television advertising.'

"Will you please give me an official opinion as to whether or not

the term 'television' is embraced in the term 'radio' advertising and is therefore excepted from the total amount of campaign expenditures permitted under the Corrupt Practices Act?

"Due to the time element involved, I shall greatly appreciate the requested opinion at the earliest possible date."

I am of the opinion that the term "radio advertising," as used in Title 17, Section 272, Code of Alabama 1940, as amended by Act No. 592, General and Local Acts 1951, page 1024, relating to expenditures of candidates for public or party office in this State, is sufficiently comprehensive to embrace television advertising. Also, the term "radio advertising," as used in Title 17, Section 271, Code of Alabama 1940, includes television advertising.

Section 272, as amended, *supra*, reads, in pertinent part, as follows:

"Section 272. (586) AMOUNT OF CAMPAIGN EXPENDITURES GRADUATED AND FIXED.—The total amount expended, other than for newspaper and radio advertising, by any candidate for public or private office voted for at an election by the qualified electors of the State, or any political subdivision thereof, for any of the purposes specified in the preceding section other than newspaper and radio advertising, for contributions to political committees, as that term is defined in Section 268 of this title, and for any purpose tending in any way, directly or indirectly, to promote or aid in securing his nomination and election, shall not exceed the amount specified herein: . . . "

(Note: The word "private" as it appears in Section 272, as amended, *supra*, is an obvious clerical error or misprison. The word "party" should be substituted therefor. Cf. Title 17, Section 272, as it appears in the 1940 Code of Alabama.)

Section 271, *supra*, reads, in pertinent part, as follows:

"§ 271. Corrupt practice defined.—Any person is guilty of corrupt practice if he directly or indirectly, by himself or through any other person, or through any political committees, in connection with or in respect of any election, pays, lends, or contributes, or offers or promises to pay, lend or contribute, any money or other valuable consideration for any other purpose than the following matters and services at their reasonable bona fide and customary value: . . . newspaper and radio advertising; . . . "

I construe the term "radio advertising," as used in both instances, to embrace television advertising. As stated in the case of *Colonial Radio Corporation v. Colonial Television Corporation*, 78 F. Supp. 546 (District Court, S. D. New York):

" . . . Both are within the field of electronics. Both employ radio waves, as described in the affidavit of Henry C. Forbes, plaintiff's Vice-President in charge of engineering. Both are manufactured of similar materials and encased in cabinets in a similar manner, in some cases both are encased in the same cabinet. Both are used by the public to receive scheduled programs for amusement, appreciation, education, interest and other purposes in the same manner. Both are usually sold by the same retailers and are treated as related fields in the trade journals. Manufacturers, such as RCA, Crosley, Philco, Emerson and Motorola, make both radio and television sets."

A quite similar construction has been placed on statutes using the term "telegraph." It has been consistently held to embrace "telephone." **Davis v. Pacific Telephone and Telegraph Company**, 127 Cal. 312, 59 Pac. 698; **Cincinnati Inclined Plane Railway Company v. City and Suburban Telegraph Association**, 48 Ohio State 390, 27 N. E. 890; **State v. Central New Jersey Telephone Company**, 53 N. J. L. 341 21 A. 460, 11 L. R. A. 664.

In the case of **Chesapeake and Potomac Telephone Company v. Baltimore and Ohio Telegraph Company**, 66 Md. 399, 7 A. 809, 59 Am. Rep. 167, the court stated:

" . . . But it is clear, if we take the term 'telegraph' to mean and include any apparatus or adjustment of instruments for transmitting messages or other communications by means of electronic currents, and signals, that term is comprehensive enough to embrace the telephone. And that the telephone is so embraced within the definition of the telegraph has been expressly decided in England, after the most careful analysis and comparison of the different instrumentalities, and the manner of using them, in the two systems. **Att'y Gen. v. Edison Teleph. Co.**, 6 Q. B. Div. 244. . . ."

It is my view that, in using the term "radio advertising," the Legislature intended to exclude the expenses of a certain means of media of advertising. We recognize the obvious distinction between a radio receiver and a television receiver. The Legislature in my opinion, in exempting the expenses of radio advertising, did not have in mind the radio receiver or a television receiver, but did have in mind the expenses of advertising arising from the employment of a means of communication based upon electronics and radio advertising," as used in Section 272, as amended, *supra*, and Section 271, *supra*, includes television advertising.

Therefore, construing the provisions of Section 272, as amended, *supra*, in light of the foregoing decisions, and taking into consideration the similarity of radio and television broadcasting, I am of the opinion the Legislature intended that the expenses for newspaper, radio, and television advertising should not be included in the total amount of

campaign expenditures permitted under this act. Likewise, contributions for newspaper, radio and television advertising would not, in my opinion, be a corrupt practice under the provisions of Section 271, *supra*.

Yours very truly,

SI GARRETT,
Attorney General

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